83 - 1619 (1)

No.

IN THE
Supreme Court of the United States
October Term 1983

CHEMICAL BANK and
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioners,

v.

GARY ASSON, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF IDAHO

PETITION FOR CERTIORARI

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April 2, 1984

80 pp

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Question Presented

Have respondent municipalities by their actions—which included inducing investment in the bonds of a public agency by expressly guaranteeing the bonds, presiding over the irretrievable expenditure of the bond proceeds on a project undertaken for public benefit, and then subsequently abrogating their guarantees as unauthorized, and refusing even to return the bondholders' funds—effected a taking of, or otherwise unconstitutionally impaired, the bondholders' property rights?

Parties to the Proceedings

Gary Asson, Le Rae Asson, Ransom H. Brown, Betty Brown, J. R. Simplot Company, Richard H. Bohle, Paula L. Bohle, Blaine Jensen, Lillian D. Jensen, Clarence F. Bellem, Lillian B. Bellem, Magic Valley Foods, Inc., and Cameron Sales, Inc., were petitioners below.

City of Burley, Idaho; Charles Shadduck, Mayor of the City of Burley; James Parker, J. Garth Payne, Frances McDonald, Dale Doman, Walter Petersen, and Truman Bradley, as members of the City Council of Burley; City of Heyburn, Idaho; Harold R. Hurst, Mayor of the City of Heyburn; Wilford Wilcox, Dean Baker, David Mayes, and Larry McComb, as members of the City Council of Heyburn; City of Rupert, Idaho; William F. Whittom, Mayor of the City of Rupert; Clark Cameron, Dwinelle E. Allred, June Dombeck and Ronald E. Klebe, as members of the City Council of Rupert; City of Idaho Falls, Idaho; and City of Bonners Ferry, Idaho, were respondents below.

Chemical Bank and the Washington Public Power Supply System were intervenors below.

A list of the subsidiaries (other than wholly owned) and affiliates of Chemical Bank called for by Rule 28.1 is attached as Appendix F. The Washington Public Power Supply System has no affiliates.

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No.

IN THE

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CHEMICAL BANK and
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

Petitioners,

v.

GARY ASSON, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

Petitioners, Chemical Bank and the Washington Public Power Supply System (the "petitioners"), respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Idaho entered on September 26, 1983, and reaffirmed on petition for rehearing by order entered on November 4, 1983.

Opinion Below

The proceedings below consisted solely of an original proceeding on writ of prohibition in the Supreme Court of the State of Idaho. The opinion and judgment of which review is sought were entered by that court on September 26, 1983, and are annexed as Appendix A; they are reported at 670 P.2d 839. Petitioner Chemical Bank filed a timely petition for rehearing, in which petitioner Washington Public Power Supply System ("Supply System") joined, on October 17, 1983; that petition is annexed as Appendix B. The Idaho Supreme Court denied the petition on November 4, 1983, by an order annexed as Appendix C. By orders dated January 23, 1984, and January 24, 1984, annexed as Appendices D and E, respectively, Justice Rehnquist extended until April 2, 1984, the time for petitioners to file this petition.

Jurisdiction

The jurisdiction of the Court to review the judgment below is conferred by 28 U.S.C. § 1257(3). This case comes within that provision because it raises the issue whether respondents' conduct constituted a taking or otherwise violated the constitutional rights of bondholders for whom petitioner Chemical Bank is trustee. In view of the surprising result reached by the Idaho Supreme Court coupled with the sweeping breadth of the relief granted by that court, those issues were raised by petition for rehearing. *See PruneYard Shopping Center v. Robins,* 447 U.S. 74, 85-87 n.9 (1980); *Missouri ex rel. Missouri Ins. Co. v. Gehner,* 281 U.S. 313, 320 (1930).

Statutes and Constitutional Provisions Involved

This case involves the following constitutional provisions and statutes, the texts of which are set forth in Appendix G:

—U.S. Const., Amend. XIV § 1.
—U.S. Const., Amend. V.
—U.S. Const., Art. I, § 10, cl. 1.
—Idaho Const., Art. 8, § 3.

Statement of the Case

Introduction

This case arises out of the largest municipal bond default in history—the recent default of petitioner Supply System on $2,250,000,000 of bonds governed by a resolution naming petitioner Chemical Bank as trustee. Those bonds were issued at the behest and for the benefit of 88 municipalities, public utility districts and rural electric cooperatives (the "participants"), including the five Idaho municipal respondents here.

As trustee, petitioner Chemical Bank represents the interests of the bondholders in this action and also in the closely related and principal litigation regarding the default which is pending in the Washington Supreme Court. Petitioner Supply System represents its own interests in these actions, including its interest in fulfilling its obligation to repay the bondholders' funds.

As explained below and in the accompanying motion to defer consideration of this petition: This case is ancillary to the principal litigation now pending in the Supreme Court of Washington. It involves only 5 of the 88 participants, all of whom are defendants in the Washington case, and it affects only a small fraction of the face amount of the bonds involved (less than 2 percent, or approximately 43 million dollars). Because of the obvious desirability of considering this case in the light of the outcome of the main litigation and avoiding piecemeal review, petitioners obtained the maximum 60-day extension for filing this petition in the hope that the decision of the Supreme Court of Washington could be considered with this petition. Although the Washington case was expedited and argued on March 26, 1984, it is pending without decision. Accordingly, to protect the bondholders and their interests, petitioners are filing this petition and are simultaneously moving to defer consideration of it and any response thereto until the Washington decision is available and this Court can consider whether to entertain any petition for a writ of certiorari filed therein.

Background

The circumstances preceding and precipitating the default may be briefly summarized as follows:

In the mid-1970's, public utility planners in the Northwest forecast a need by 1983 for electric generating capacity substantially in excess of existing and planned capacity. The participants, all of whom supply electricity to various customers, sought to avert this power shortfall by joining in a common venture, in which each engaged the Supply System to use its best efforts to construct and operate nuclear facilities (the "projects") on its behalf. In entering into this common endeavor, the participants pursued three basic goals:

> *First*, the participants wished to avoid expenditure of any of their own funds during construction of the projects. This goal necessitated resort to 100% outside financing.
>
> *Second*, the participants wished to translate all of the projects' anticipated benefits into savings for their ratepayers. Because the participants' goal was to reserve all of the venture's upside potential for themselves, obtaining power at the cost of production and leaving no potential for others to profit, the participants procured outside financing through issuance of debt, not equity, securities.
>
> *Third*, rather than engage in 88 separate issues of debt at each stage of financing, the participants wished to consolidate financing responsibility in the Supply System. Because the Supply System lacked any assets to secure the borrowings, this third goal required that the participants guarantee the Supply System's ability to repay funds that it would borrow on the participants' behalf.

These goals were fully realized through the Participants' Agreements ("Agreements") that the participants executed to take part in the common venture. Those Agreements required the Supply System to use its best efforts to obtain 100% outside financing through issuance of bonds. To provide the security required to market the bonds, the Agreements required the participants to make payments to the Supply System sufficient

to permit it to service its debt, whether or not the projects ultimately produced electricity, and to do so through the rates charged by the participants for electricity furnished to their customers. Those guarantees by each participant remained in force under the Agreements even if the Supply System or any participant failed to perform its contractual obligations.

The participants fully recognized the crucial role of the guarantees in permitting their common endeavor to go forward. To induce the financing required to permit the projects to proceed without expenditure of the participants' own funds, the participants unambiguously and repeatedly over a period of four years assured the purchasers of the bonds that the participants possessed—and would exercise—the authority to secure the Supply System's ability to repay the borrowed funds. On the strength of those frequently reiterated assurances, private parties advanced $2,250,000,000 for bonds issued to finance the participants' venture. Those bonds were issued in 14 series beginning in March 1977 and ending in March 1981.

The participants oversaw each of the 14 bond issues, as well as the expenditure of the proceeds of those issues, through a "Participants' Committee" ("Committee") composed of officials of the participants whom the participants elected and controlled. The Committee retained supervisory power over every significant action relating to the projects, as well as the right to propose and implement the participants' own plans. In addition to the control they exercised through the Committee, many of the participants were members of the Supply System, controlling 88% of the voting power vested in the Supply System's Board. In that capacity, those participants acted as fiduciaries for all other participants, including the five municipal respondents here.

By 1981, substantial cost overruns had created the need for additional financing. After unsuccessfully attempting to obtain such financing, the Supply System determined, through its Board of Directors, that "financing conditions beyond its control" had rendered it unable to complete construction of the projects. On January 22, 1982, the Board terminated the

projects pursuant to the termination provisions in the Agreements.

Prior to the point at which the Supply System encountered serious financing difficulties, no participant had publicly raised any question as to its authority to guarantee the debt incurred on its behalf. Nor had any of the participants' ratepayers sought to contest the propriety of the guarantees that had enabled the participants to join in the projects for the ratepayers' benefit without advancing public funds.

When it became clear that the projects would not succeed, however, almost all of the participants abruptly reversed their positions. They contradicted their prior representations and assurances, asserting that they never possessed authority to execute the unconditional guarantees on which they had invited bond purchasers and the Supply System to rely. Because the Supply System's ability to repay its obligations was totally and directly dependent on the participants' performance under their guarantees, the participants' repudiation of those guarantees required the Supply System to default on its bonds. Although they are not, and do not claim to be, financially insolvent, the participants have repudiated even an obligation to make restitution or otherwise to return the original loan advanced on the basis of their assurances. The participants thus imposed the entire cost of their venture on the bondholders.

The Main Washington Proceeding

In the main proceeding consolidating most of the claims relating to the participants' obligations, the Washington Supreme Court is now considering the legality of the conduct of all participants and the issues raised by petitioners under the federal and state constitutions.[1] The five Idaho participants who

[1] Three separate state court actions have addressed certain of the issues relating to the participants' obligations. *DeFazio v. Washington Public Power Supply System,* discussed *infra* at p. 11 & n.4, was instituted by ratepayers in Oregon in December 1981. The main proceeding was instituted by petitioner Chemical Bank in Washington in May 1982. The present case was instituted by ratepayers in Idaho in August 1982.

are the municipal respondents here are also defendants in that case, where they have joined with most of the other participants in vigorously claiming a right to avoid all obligations to the bondholders. Because the two cases are so closely related, and the decision in the main case will bear importantly on the effect of the decision below and the need to review it, petitioners are simultaneously moving this Court to defer its consideration of this petition until the main Washington proceeding has been decided and this Court can decide whether to entertain any petition for certiorari filed therein.

The Present Case

This ancillary case was brought as an original action in the Supreme Court of Idaho for a writ of prohibition. That action was filed by local ratepayers who sought to bar performance by the five participating Idaho municipalities under the Participants' Agreements on the ground that those municipalities lacked authority to guarantee the debt incurred on their behalf. Those five municipalities and certain of their officials were named as respondents. None of the bondholders or their representatives were joined as parties. Chemical Bank and the Supply System were forced to intervene to protect the bondholders and their interests.

Four of the five respondent Idaho municipalities, instead of defending their authority in court, disclaimed their prior assurances regarding the scope of their authority and adopted the ratepayers' contentions.[2] The Supreme Court of Idaho divided four to one in holding that the participating Idaho municipalities lacked authority to execute the guarantees that provided bondholders with the only security for their loan. On the basis of that holding, the Court granted the writ of

[2] Although the respondent City of Heyburn did not adopt the ratepayers' contentions, it remains the beneficiary of the resulting judgment adverse to the petitioners based on those contentions. Moreover, in the Washington proceeding, the City of Heyburn seeks to avoid any obligation to the bondholders on grounds other than lack of authority.

prohibition and entered a judgment barring the five Idaho municipal participants from imposing any rate or charge on any consumer of electricity to fund any obligation arising out of the challenged guarantees.

The holding of the Supreme Court of Idaho was surprising in view of the history of public power in the Northwest, the ownership and operation by each of the municipalities of an electrical distribution system, their unchallenged participation in three previous nuclear power projects, and the repeated assurances given of their authority to participate in the instant projects, which were believed necessary to avert an anticipated power shortage and serve their customers. Since this unanticipated holding raised substantial questions about the taking of private property contrary to provisions of the federal and state constitutions, petitioners presented those and other questions in the Petition for Rehearing (Appendix B) which was denied by order (Appendix C) without further opinion.

Reasons for Granting the Writ

The nation's largest municipal bond default is naturally a matter of considerable public interest. The decision below and the main litigation now awaiting decision by the Supreme Court of Washington raise substantial questions regarding whether the bondholders' property has been taken without due process in violation of federal constitutional guarantees. The actions of the five Idaho municipalities and most of the other 83 participants in inducing the sale of $2.25 billion of bonds, in spending that vast sum for public purposes, and then in repudiating their undertakings and disclaiming any responsibility for restitution or other relief when the projects soured, warrant review by this Court. Review is further needed because the decision below, holding that the Idaho municipalities lacked authority to make the necessary agreements, is a surprising change in local law that leads to evasion of the principles followed by this Court in applying the federal constitutional guarantees against the taking of private property without due process.

1. Respondents' course of conduct violates the most basic constitutional constraints on governmental power:

> *First*, after deliberately creating and repeatedly reinforcing the bondholders' expectations in order to induce private financing of a public venture, respondents have now destroyed those expectations for their own benefit. Yet the Constitution does not permit government to create "investment-backed expectations" and then subject those expectations to abrupt and total defeat. *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 179 (1979).
>
> *Second*, respondents have imposed the entire cost of a public venture on a relatively small group of private parties. Such unfair conduct is precisely what the Takings Clause precludes:
>
> "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).[3]

The ultra vires doctrine invoked below was never intended to override, and, indeed, is clearly subject to, these basic

---

[3] The Takings Clause of the Fifth Amendment is rendered applicable to the states through incorporation in the Due Process Clause of the Fourteenth Amendment. *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 160 (1980). Recent cases have suggested that the Takings Clause, the Contract Clause and the Due Process Clause are governed by the same underlying principles. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 & n.12 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 14-15 (1977); Note, *The Supreme Court, 1977 Term*, 92 Harv. L. Rev. 57, 98 (1978) (comparing Contract Clause and Takings Clause); Note, *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 84 (1977) ("constitutional jurisprudence has tended to subsume the [contract] clause under the due process and takings provisions of the fifth and fourteenth amendments").

constitutional constraints. That doctrine may properly limit a municipality's contractual liability on the unavoidable occasions where officials, by evading supervision, manage to initiate transactions that exceed municipal power. But the ultra vires doctrine cannot insulate electorates and the governmental bodies they control from responsibility for deliberate policy decisions—vigorously and consistently followed—that operate to confiscate investors' funds for public purposes. No state law can properly confer such sweeping immunity, for it would thereby render unavailable any remedy for victims of unconstitutional action.

Precisely that result is threatened here. This is not a case in which duly constituted authorities have asserted the ultra vires doctrine immediately upon discovering the improper transactions of an unsupervised official. To the contrary, those who now repudiate all obligations to the bondholders are the very same collegial bodies that initially assumed those obligations. Their decision to enter the common venture was a matter of public knowledge. They repeatedly reaffirmed that decision without objection from the ratepayers whom they sought to benefit. For as long as their venture continued with some prospect of success, respondents likewise repeatedly gave assurances that they possessed the authority to secure the bondholders' funds.

Only when their venture failed did respondents change their view. Only then—after the bondholders' funds had already been expended for public benefit—did respondents discover a need to "protect the public" by renouncing an established course of conduct that they had themselves initiated and in which their constituents, seeking their own benefit, had long acquiesced.

Respondents have contended that state law allows them to disclaim all responsibility for their prior assurances and conduct. But state law cannot relieve governmental bodies of responsibilities which the Federal Constitution requires them to bear. Moreover, investors do not advance their life savings, as

have many of the bondholders here, on the understanding that they will be repaid only if the borrower considers it expedient. If state law had provided respondents with the extraordinary prerogative they now assert, they could not have sold a single bond.

Having sold the bonds, having spent the $2.25 billion proceeds for public purposes, and having repudiated their contracts and refused even to return the bondholders' original loan, respondents have effected a taking of private property for which the Federal Constitution requires compensation.

2. The need for this Court's review is heightened by the surprising and unexpected nature of the decision below—a decision which can be fairly characterized as a startling *ad hoc* change of law that had the effect of releasing respondent municipalities from obligations that had prompted widespread resentment among their constituents. It is hardly exaggerated to view the litigation as a preemptive strike by which local interests were allowed to repudiate a bargain, made for their benefit, because it turned out badly. As the dissenting justice noted (Appendix A at A-21):

> "It is only because, through hindsight, the majority can see what a 'bad deal' the cities have made that they now attempt to extricate these cities from their precarious position through a unique interpretation of our constitution as applied to the facts of this case."

The decision below, letting the Idaho municipalities off the hook, stands in sharp contrast to the recent unanimous decision of the Supreme Court of Oregon (authored by Justice Linde) that refused to apply hindsight to relieve the Oregon participants from their undertakings.[4] Considering similar state constitutional and statutory provisions, the Oregon court unani-

[4] *DeFazio v. Washington Public Power Supply System,* Nos. TC 16-81-11344; CA A26721; SC 29649, slip op. (Ore. S. Ct. March 20, 1984). For the Court's convenience, a copy of the Oregon Supreme Court's decision has been separately bound and filed with this petition.

mously concluded that the Oregon participants had the authority that the majority of the Idaho court decided was lacking.

The surprising and unanticipated nature of the decision below is apparent from the majority and dissenting opinions (Appendix A). The five Idaho participants owned and operated electrical distribution systems. They had participated in financing previous nuclear power projects. They joined with the other participants in undertaking the instant projects because of studies that additional power facilities were needed for their customers. They repeated assurances of their authority without challenge until the projects went sour. Depite all that history, the majority below concluded that the undertakings were not ordinary and necessary expenses authorized by the general laws of Idaho. As the dissent indicated, this departed from the prior construction of the "ordinary and necessary" provision of Article 8, Section 3 of the Idaho Constitution (Appendix A, at A-23 to A-24; Appendix G at G-1 to G-3).

The effect of the holding below is to leave the bondholders without any remedy. The Idaho Supreme Court rejected without discussion the federal constitutional constraints on its decision and likewise ignored the basic equitable principles that plainly were offended by respondents' conduct. For example, although respondents had expressly and repeatedly represented that the Participants' Agreements were proper in all respects, the court dismissed without discussion petitioners' claim that estoppel barred respondents from repudiating their assurances. Similarly, although it had not even been suggested that the bondholders acted in bad faith, or that they were otherwise in any way at fault, the court dismissed without discussion petitioners' claim that, if respondents were to be released from their contractual obligations, then they must at least make restitution of the bondholders' original investment.

This Court has recognized that alterations of state property law may present a dangerously effective means of increasing public wealth at the expense of private parties who lack power to protect themselves. Responding to this threat, this Court has held that state courts, "by *ipse dixit,* may not transform private

property into public property without compensation." *Webb's Fabulous Pharmacies v. Beckwith,* 449 U.S. 155, 164 (1980). Similarly:

> ". . . a state [court] cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes v. Washington,* 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring).

See also Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42 (1944); *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95, 100 (1938); *Broad River Power Co. v. South Carolina,* 281 U.S. 537, 540 (1930). This case presents a similar problem. The decision below would let local authorities and citizens retroactively disclaim responsibility for monies borrowed and spent for public purposes and leave the bondholders throughout the nation without remedy. Such protection of parochial interests without regard to the federal constitutional restraints on state action warrants review by this Court.

Conclusion

For the foregoing reasons a Writ of Certiorari should be granted to review the opinion and judgment of the Supreme Court of Idaho in this case.

April 2, 1984.

Respectfully submitted,

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APPENDIX A

APPENDIX A

1983 Opinion No. 131

IN THE SUPREME COURT OF THE STATE OF IDAHO

NOS. 14719 and 14309

GARY ASSON and LERAE ASSON, husband and wife, citizens of the City of Burley; RANSOM H. BROWN and BETTY BROWN, husband and wife, citizens of the City of Heyburn; and J.R. SIMPLOT COMPANY,

Petitioners,

v.

CITY OF BURLEY; CHARLES SHADDUCK, Mayor of the City of Burley; JAMES PARKER, J. GARTH PAYNE, FRANCES MCDONALD, DALE DOMAN, WALTER PETERSEN, and TRUMAN BRADLEY, as members of the City Council of Burley; CITY OF HEYBURN, HAROLD R. HURST, Mayor of the City of Heyburn; and WILFORD WILCOX, DEAN BAKER, DAVID MAYES, and LARRY MCCOMB, as members of the City Council of Heyburn,

Respondents.

No. 14719

Boise, May Term, 1983
Filed: September 26, 1983
Frederick C. Lyon, Clerk

RICHARD H. BOHLE and PAULA L. BOHLE, husband and wife; BLAINE JENSEN and LILLIAN D. JENSEN, husband and wife; CHARLES B. PARK and BILLIE F. PARK, husband and wife; CLARENCE F. BELLEM and LILLIAN B. BELLEM, husband and wife; MAGIC VALLEY FOODS, INC., an Idaho corporation; CAMERON SALES, INC., an Idaho corporation,

Petitioners,

v.

CITY OF RUPERT, WILLIAM F. WHITTOM, Mayor of the City of Rupert, CLARK CAMERON, DWINELLE E. ALLRED, JUNE DOMBECK and RONALD E. KLEBE, as members of the City Council of Rupert.

Respondents.

No. 14809

Original proceeding: Petition for Writ of Prohibition.

Petition for Writ of prohibition to prevent cities from increasing municipal electric rates to pay debt obligation of allegedly unauthorized electric power contract. Alternative writ made permanent.

Craig Meadows and Phillip M. Barber of Boise, for petitioners Asson, et al.

Roger D. Ling of Rupert for petitioners Bohle, et al.

William Parsons of Burley for respondent City of Burley. Stephen A. Tuft of Burley for respondent City of Heyburn.

Donald J. Chisholm of Burley for respondent City of Rupert.

A. L. Smith of Idaho Falls for intervenor City of Idaho Falls.

Peter B. Wilson of Bonners Ferry for intervenor City of Bonners Ferry.

R. B. Kading, Jr., and R. M. Turnbow, of Boise, for intervenor Washington Public Power Supply System.

Howard Humphrey, and Stanley Welsh, of Boise, for intervenor Chemical Bank.

HUNTLEY, J.

In 1976, five Idaho cities[1] (parties to this action) entered into an agreement with the Washington Public Power Supply System (WPPSS) for future supplies of electrical energy to be generated by two planned nuclear power plants. Although the plant projects were later terminated, under the terms of the agreement the cities were nevertheless required to continue to pay their percentage shares of the bond obligations incurred, amounting to millions of dollars. Residents and purchasers of electricity of three of the five cities brought this petition for a writ of prohibition, pursuant to this Court's authority under Idaho Const. Art. 5, § 9 and I.C. §§ 7-401, 402, to prevent the respondent cities from raising municipal electric rates to cover their payment obligations. The petitioners allege the cities acted without constitutional authority when entering into the 1976 agreements.

The record shows that each of the five Idaho cities owns and operates an electrical distribution system that carries electricity within the city and to nearby areas.[2] However, only two of the cities have generating facilities (Idaho Falls and Bonners Ferry), and those facilities do not supply all of their power needs. Thus, each of the five cities relies on outside electricial power supplies. Since 1963 (and before, for several cities) the outside supplier has been the federal government, through its agency the Bonneville Power Administration (BPA). The BPA provides the Pacific Northwest region with comparatively inexpensive hydroelectric power generated at facilities along the Columbia River system.

In the late 1950's and early 1960's, Pacific Northwest cities were receiving forecasts of greatly increased future energy demands. It was expected that the Northwest's hydroelectric resources would soon be inadequate to meet the needs of the region's power users. During this period, and through the late 1960's and into the 1970's, cooperative efforts were made by electricity purchasers such as municipalities and utility districts to predict the region's future energy needs and to make plans to

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[1] Burley, Rupert, Heyburn, Idaho Falls and Bonners Ferry (the latter two are in the suit as intervenors).

[2] The essential facts were submitted by stipulation of all parties.

meet them. Organizations such as the Public Power Council and the Pacific Northwest Utilities Conference Committee involved utilities in the region in energy forecasting and planning activities.[3] Another organization, the Joint Power Planning Council, including BPA and many of its power customers, made a study of future energy requirements and concluded that new electrical generating plants would have to be built to keep pace with increasing power demands. A plan was developed which called for the construction of several thermal power plants.

In January 1971 and 1973, and September 1973, the five Idaho cities, together with other Pacific Northwest utilities, entered into agreements with WPPSS to purchase electrical "project capability" from three nuclear power plants to be constructed by WPPSS.[4] Financing for the three nuclear plants was arranged under a plan called "net billing." The cities were to purchase shares of project capability from WPPSS, payment for which was to be made out of city utility revenues. The cities would then assign their project capability to BPA, which would reimburse the cities by reducing their wholesale power bills in

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[3] The Pacific Northwest Utilities Conference Committee was comprised of 130 public and private utilities in the region. Each year it published the "West Group Forecast," a compilation of forecasts of "load growth" from each of the utilities in the region. Those forecasts supported predictions of power shortages by the 1980's.

[4] WPPSS is a municipal corporation and joint operating agency authorized under Washington state laws to finance, construct, own and operate electrical generating facilities. It was established in 1957 and is composed of 19 public utility districts and four Washington cities. "Project capability" which the utilities contracted to purchase from WPPSS is a percentage share of the potential output of nuclear plants to be constructed. In the agreement it is defined as follows:

> "the amounts of electric power and energy, *if any*, which the projects are capable of generating at any particular time (including times when either or both of the Plants are not operable or operating or the operation thereof is suspended, interrupted, interfered with, reduced or curtailed, in each case in whole or in part for any reason whatsoever), less Project station uses and losses." (Emphasis added.)

amounts equal to their payments to WPPSS. In this way, BPA would actually fund the WPPSS projects.[5]

Each city entered into the agreement with respect to these first three plants (referred to as Projects 1, 2, and 3) after passage by its city council of a resolution authorizing execution of the agreement. Each city also represented, in the form of an opinion letter from its counsel, that it had authority to enter into the agreements.[6] The cities had specified statutory authorization, by means of a provision enacted in 1971, to participate in a net-billing arrangement and purchase electrical power to be resold to BPA:

> "I.C. § 50-342. *Electric Power—Purchase or disposal.*—In addition to the powers otherwise conferred on cities of this state, a city owning and operating an electric distribution system shall have the authority to purchase electric power and energy for the purpose of disposing of such power and energy to the United States of America, department of the interior, acting by and through the Bonneville power administrator, through exchange, net billing or any arrangement which is used for supplying the needs of the city for electric power or energy, and such authority shall not be subject to the requirements, limitations, or procedures contained in sections 50-325 and 50-327, Idaho Code."[7]

The net-billing financing plan made it possible for BPA to assist in insuring future supplies for its electricity customers. Each participating utility pays WPPSS its share of the costs of

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[5] The participants would pay debt service on the bonds through their monthly payments to WPPSS, and BPA would, in effect, reimburse the participants.

[6] Each city received a form opinion letter from WPPSS which it was required to follow in stating its authorization, as a prerequisite to entering into the agreement.

[7] I.C. §§ 50-325 and 50-327 would have prevented sale of electrical power to BPA by the cities unless it was excess power. I.C. § 50-342 removed that limitation. The section was amended in 1981 and 1982.

developing the projects, and BPA gives the participant a credit in the amount of such payment on the BPA bill for power purchased by the participant.

In December 1973 the Public Power Council investigated the possibility of two additional power plants to be designed, financed and built by WPPSS. For various reasons (one of which was a 1973 Treasury Department ruling denying tax exempt status for bonds to finance additional thermal plants from which BPA would receive more than 25% of the energy output), the two newest plants (Projects 4 and 5) could not be financed under the same arrangements as Projects 1, 2 and 3, which had BPA involvement. During 1974 and the first half of 1975, the Public Power Council, BPA, WPPSS and various utilities discussed possible financing plans for Projects 4 and 5.

Although three nuclear plants were already being built, many Northwest utilities were still convinced that the future would bring energy demands well beyond the output of existing and planned power plants. BPA customers were made aware of a possible "notice of insufficiency" in 1973 and thereafter. The "notice of insufficiency" was an official statement by BPA to its preference customers that it would not be able to supply them with sufficient electricity by the early 1980's. BPA informed its customers that unless a plan were created to provide for future power production it would be forced to issue its notice of insufficiency.[8]

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[8] The notice of insufficiency was finally issued in June, 1976. BPA's letter to the cities stated, in part:

> "Bonneville has completed an analysis of the resources it estimates will be available for disposition and its requirements and commitments to supply firm energy in the year July 1, 1983, to June 30, 1984. As a result of this analysis, Bonneville has determined that the firm energy resources available to it will be insufficient in that year to supply in full the City's firm energy requirements, the firm energy requirements of other preference customers, and Bonneville's obligations to deliver firm energy to its other customers.
>
> Therefore, in accordance with the provisions of the Power Sales Contract, I hereby give notice, effective at 2400 hours on June 30, 1976, that in the year beginning July 1, 1983, and in

The proposed additional nuclear plants were to be located at the same sites as Projects 1 and 3 to reduce costs. Costs were projected to be low in comparison to other alternative power facilities. Impelled by the region's forecasts of energy shortages and the apparent advantageous circumstances of pairing two new plants with projects already under construction, the cities entered into a second set of agreements with WPPSS in July 1976.

The agreements, in summary form, provided that WPPSS would use its best efforts to arrange financing for the two plants, to obtain regulatory permits, to issue and sell bonds, and to complete planning and engineering studies, arrange for construction and timely completion of the plants, and thereafter maintain the plants. Project 4 was to be completed in March 1982, and Project 5 in April 1984. If WPPSS failed to secure financing, or if the plants were not completed as planned, the participating cities were nevertheless bound to pay their obligations. The agreement provided:

> "The Participant shall make the payments to be made to Supply System [WPPSS] under this Agreement whether or not any of the Projects are completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of either Project for any reason whatsoever in whole or in part. Such payments shall not be subject to any reduction, whether by offset or otherwise, and shall not be conditioned upon performance or nonperformance by Supply System or by any other Participant or entity under this or any other agreement or instrument, the remedy for any non-performance being limited to mandamus, specific performance or other [sic] legal or equitable remedy."[9]

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each year thereafter during the term of the Power Sales Contract, Bonneville's obligation to supply firm energy to the City will be limited to an allocation, the amount of which will be computed according to the terms of Section 22 of the General Contract Provisions."

[9] Section 6(d), p. 19 of the agreement, referred to as the "hell or high water clause."

The payment obligation of each city was based on its percentage share of the project capability purchased. The city pays its percentage of the projects' annual budget and fuel costs, including all of WPPSS' cost of ownership, debt service on bonds, and all other costs. The cities' obligation to pay was to begin on the earliest of three dates: (1) continuous operation of any plant; (2) July 1, 1988; or (3) one year after termination of any project.

Projects 4 and 5 were terminated in January 1982 when WPPSS was unable to secure sufficient financing to complete the plants. At the time, Project 4 was approximately 20% complete and Project 5 was approximately 16% complete.[10] Bonds had been issued by WPPSS in the amount of $2.25 billion.[11]

Under the agreement, the cities' payment obligations are limited to revenues derived from the operation of their utility systems. Each participant agrees to establish, maintain and collect electrical charges adequate to cover its payment obligations. In the event a participant defaults, provision is made for the non-defaulting participants to assume payment of the defaulter's obligation, up to a maximum of 25% of their own obligations.

As they had done with Projects 1, 2 and 3, the cities submitted opinion letters stating they were authorized by law to enter into the Project 4 and 5 agreements. Although the two sets of agreements were essentially the same (both involved the purchase of project capability, under the same terms, and both contained the so-called "dry-hole liability" provision), the financing arrangements were different in one important aspect—involvement of BPA. In the Project 4 and 5 agreements,

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[10] The WPPSS Board of Directors and Executive Board terminated the projects by adoption of Resolutions no. 1203 and no. 34, giving as the reason WPPSS' inability to proceed due to financing conditions beyond its control.

[11] Each city's share of the principal amount of the bonds sold is as follows: Burley, $4.275 million; Rupert, $7.290 million; Heyburn, $5.782 million; Idaho Falls, $20.587 million; Bonners Ferry, $4.275 million.

the cities are ultimately liable for the "dry-hole" risk, whereas in the earlier agreements the cities incur no expense for which they do not obtain electrical power in like amount from BPA. In that sense, the Project 1, 2 and 3 agreements were similar to power purchase contracts. The cities received electricity in proportion to their payments to WPPSS.

Petitioners allege the cities acted in violation of the Idaho Constitution, Art. 8, §§ 3 and 4, and Art. 12, § 4, when they entered into the Project 4 and 5 agreements. Since our analysis of the applicability of Art. 8, § 3 is dispositive of the case, we need not address the other constitutional provisions. Art. 8, § 3 states:

> "Limitations on county and municipal indebtedness —*No* county, *city,* board of education, or school district, or other subdivision of the state, *shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two thirds (⅔) of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provisions shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within thirty (30) years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void:* Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state and provided further that any city may own, purchase, construct, extend, or equip, within and without the corporate limits of such city, off street parking facilities, public recreation facilities, and air navigation facilities, and for the purpose of paying the cost thereof may, without regard to any limitation herein imposed, with the assent of two thirds (⅔) of the qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and

interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by, such facilities as may be prescribed by law, and provided further, that any city or other political subdivision of the state may own, purchase, construct, extend, or equip, within and without the corporate limits of such city or political subdivision, water systems, sewage collection systems, water treatment plants, sewage treatment plants, and may rehabilitate existing electrical generating facilities, and for the purpose of paying the cost thereof, may, without regard to any limitation herein imposed, with the assent of a majority of the qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by such systems, plants and facilities, as may be prescribed by law; and provided further that any port district, for the purpose of carrying into effect all or any of the powers now or hereafter granted to port districts by the laws of this state, may contract indebtedness and issue revenue bonds evidencing such indebtedness, without the necessity of the voters of the port district authorizing the same, such revenue bonds to be payable solely from all or such part of the revenues of the port district derived from any source whatsoever excepting only those revenues derived from ad valorem taxes, as the port commission thereof may determine, and such revenue bonds not to be in any manner or to any extent a general obligation of the port district issuing the same, nor a charge upon the ad valorem tax revenue of such port district." (Emphasis added.)

Since it is admitted that no election was held by any of the five cities to obtain approval of the electorate prior to entering into the agreements in question, petitioners contend the cities contracted indebtedness in violation of the Idaho Constitution, and their indebtedness or liability is therefore void. Respondent City of Heyburn and intervenors WPPSS and Chemical Bank[12]

[12] Chemical Bank, a New York corporation, is trustee for the holders of bonds issued by WPPSS to finance construction of Projects 4 and 5.

argue, however, that Art. 8, § 3 does not apply to the financing arrangement in this case because that provision contemplates an indebtedness for which taxes would need to be assessed, and the cities' payment obligations here are to be satisfied out of utility revenues alone.

Such an interpretation, however, would ignore the plain language of the constitutional provision, which states that "[n]o . . . city . . . shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two thirds (⅔) of the qualified electors thereof. . . ." While it is true that the provision goes on to add another requirement, relating to the collection of an annual tax to pay interest on the debt and a sinking fund to pay the principal, the latter requirement is simply sound fiscal policy and does not relate to the primary constitutional mandate of electorate approval of substantial and far-reaching municipal indebtedness. A financing plan which provides for amortization of the indebtedness by some means other than assessment of taxes might be held to satisfy that part of Art. 8, §3 which calls for an assessment, but it cannot fulfill the requirement of voter approval.

City of Heyburn, WPPSS and Chemical Bank also contend that Art. 8, §3 would be inapplicable under the rule distinguishing municipal indebtedness from "special fund" indebtedness.

It is urged that we overrule Feil v. City of Coeur d'Alene, 23 Idaho 32, 129 P. 643 (1912), and apply the "special fund" doctrine in this case. That doctrine, accepted by a great majority of cases,[13] holds that a municipality does not contract indebtedness or incur liability, within the constitutional limitation, by undertaking an obligation which is to be paid out of a special fund consisting entirely of revenue or income from the

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[13] For a list of other jurisdictions applying the special fund doctrine, see Moore, Constitutional Debt Limitations on Local Governments in Idaho—Article 8, Section 3, Idaho Constitution, 17 Idaho L. Rev. 55, 65 n. 50 (1980).

property purchased or constructed. *Feil* dealt with a decision by the city of Coeur d'Alene to purchase a municipal water system, to be financed by bonds which would be repaid out of a fund containing only the revenues derived from operation of the water works. It was argued that since no indebtedness was contracted by the city itself—but rather only by the bond fund—the expenditure did not come under Idaho Const. Art. 8, §3. The *Feil* court rejected that argument, reasoning that Idaho's expansive constitutional provision (which, unlike several other states' examined by the court, contained the word "liability" as well as "debt") included an indebtedness paid out of a fund separate from the city's general fund. The court was critical of "subtleties and refinements of reasoning" utilized to suggest that no liability is incurred where a special fund is involved. 23 Idaho at 49, 129 P. at 649. Since *Feil,* a series of cases have declined to apply the special fund doctrine. *See,* Boise Development Co. v. Boise City, 26 Idaho 347, 143 P. 531 (1914); Miller v. City of Buhl, 48 Idaho 668, 284 P. 843 (1930); Williams v. City of Emmett, 51 Idaho 500, 6 P.2d 475 (1931); Straughn v. City of Coeur d'Alene, 53 Idaho 494, 24 P.2d 321 (1932); O'Bryant v. City of Idaho Falls, 78 Idaho 313, 303 P.2d 672 (1956).

However, *Feil* and its quite extensive succession of authority no longer prevent application of the special fund exception because that exception has been made a part of Idaho law by way of amendments to Art. 8, § 3. *See,* Idaho Water Resource Board v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976).[14] The first such amendment, passed in 1950, authorized cities to purchase or construct water and sewage systems, treatment plants, and off-street parking facilities to be financed by bonds, "the principal and interest of which to be paid solely from revenue derived from rates and charges for the use, and the services rendered by, such systems, plants and facilities . . ." Subsequent

[14] The court stated "furthermore any doubt as to the precedential value of the *Feil* opinion has been removed by subsequent amendments by the people of this state to Art. VIII, §3, which now authorizes a municipality to do what was impermissible at the time the case was decided," citing to Schmidt v. Village of Kimberly, 74 Idaho 48, 256 P.2d 515 (1953). 97 Idaho at 558, 548 P.2d at 58.

amendments have increased the scope of the special fund exception to include port districts (1964), public recreation facilities (1966), air navigation facilities (1968), and rehabilitation of existing electrical generating facilities (1976). We note that, with the exception of port districts, indebtedness of a city for any of the purposes listed, even though not subject to the tax assessment provision of Art. 8, § 3, is nevertheless specifically conditioned on voter approval. The intent of the framers of the constitutional amendments, and the electorate through their ratification, is clear that approval of a municipality's qualified voters is necessary whether its Art. 8, § 3 indebtedness or liability is against the general fund of the city, and its tax revenues, or limited to a special fund of project-generated revenues.

It might be argued that since Art. 8, § 3 provides for "rehabilitation of existing electrical generating facilities" and makes no mention of construction of new facilities or indirect financing of new facilities through purchase of project capability, the latter purposes are not covered by the requirements of that section. However, it seems unreasonable to believe that the framers and ratifiers of the amendments intended for a city to obtain assent from a majority of its qualified voters to rehabilitate or repair its electrical plant and yet not obtain voter approval of the financing of completely new generating facilities, at perhaps several times the cost.

The better view is that the constitutional provision requires a city to obtain only a simple "majority" voter approval where the indebtedness undertaken is only for the rehabilitation of existing facilities (a purpose more similar to the "ordinary and necessary expenses" exception), whereas if the indebtedness is for the construction of wholly new facilities (obviously a much more extensive undertaking), then the "two thirds (⅔)" majority approval within the general application of the article would apply. This interpretation is substantiated by the 1972 amendment which divided the special fund exceptions into two groups: those requiring two-thirds voter approval and those requiring only a simple majority.[15] When the provision cov-

[15] H.J.R. No. 73, 1972 Idaho Sess. Laws p. 1251.

ering the rehabilitation of existing electrical generating facilities was added in 1976, it was placed within the second group.

Reasoning *a fortiori,* we cannot conceive of an interpretation of Art. 8, § 3 which would sanction the extensive, long-term indebtedness undertaken by the cities herein without an election.[16] Art. 8, § 3, if it has application to a city's issue of bonds to finance rehabilitation of its electrical generating facilities, surely applies to a city's guaranty of bonds issued to construct two new nuclear power plants.

Thus, were we to accept the argument that the cities' liability comes under the special fund doctrine, the indebtedness would still be without constitutional authority because Art. 8, § 3, requires voter approval of qualifying indebtedness regardless of the method or source of repayment. However, we do not believe the special fund exception is applicable here. The special fund doctrine is normally applied in situations where the city's indebtedness is for the purpose of building or buying revenue-producing property, and only the revenue produced from that particular property is used to repay the indebtedness. For example, a city might issue bonds to fund construction of a power generating station, the bonds being repayable from income generated by the power station. Such financial undertakings might be said to "pay for themselves," leaving no possibility of obligation on the city's general fund (requiring replacement by additional taxation). In the present case, the cities' obligation to pay off the WPPSS bonds

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[16] The amortized monthly cost of each city's share of the $2.25 billion bond obligation, over 30 years, is:

Burley, $29,752.00 per month,
Rupert, $50,735.00 per month,
Heyburn, $40,244.00 per month,
Idaho Falls, $143,279.00 per month,
Bonners Ferry, $29,752.00 per month.

Simple mathematics reveals overall indebtedness ranging from a low of $10,710,720.00 for Burley and Bonners Ferry, to a high of $51,580,440.00 for Idaho Falls. It is unthinkable to suggest that a constitutional provision intended to require voter approval of any debt which exceeded the income provided for it during one year does not apply to a $10.7 million debt for a city of 1,906 people (Bonners Ferry, 1980 census).

has created no revenue-producing property. The cities receive no electrical power for their monthly payments to WPPSS, and must raise their rate charges on power they already purchased to create a fund out of which to pay WPPSS. In essence, they must impose a surcharge on their rate-paying residents and other electrical power users, for which they provide no additional service.[17] Indeed, far from qualifying as a special fund exception, this indebtedness might constitute a general obligation on the city for which it has nothing to show.[18]

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[17] To the extent this surcharge imposes an obligation on the rate-payer unrelated to the quantity of electricity used, it could constitute a tax. Supposing the extremely unlikely situation of there being only one rate-payer in the municipality, or of the whole group of rate-payers passing a month without using any electricity, under the terms of its agreement with WPPSS, the city would be compelled to charge a "rate" sufficient to make its monthly payment to WPPSS no matter how unreasonable it would be as to the single rate-payer, or in spite of the fact that no service was provided. The supposition may be fanciful, but it serves to illustrate the nature of the revenues collected by the city; they are not properly "utility revenues." *See,* 12 McQuillin, *Municipal Corporations* § 35.38 (1970).

[18] In light of the contractual requirement that non-defaulting participants assume the burden of paying a defaulting participant's share (up to 25% of their individual shares), there arises the question of a defaulting municipality's liability to its fellow participants, which may elect to sue it. They would not be bound as WPPSS is to recovery only against the special fund, the agreement providing:

> "If the Participant shall fail or refuse to pay any amounts due to Supply System hereunder, the fact that other Participants have assumed the obligation to make such payments shall not relieve the Participant of its liability for such payments, and the Participants assuming such obligation, either individually or as a member of a group, shall have a right to recovery from the Participant. Supply System or any Participant as their interests may appear, jointly or severally, may commence such suits, actions or proceedings, at law or in equity, including suits for specific performance, as may be necessary or appropriate to enforce the obligations of this Agreement against Participants, which obligations shall include reasonable attorneys' fees in all trial and appellate courts." Section 17(e), pp. 48-9.

If other participants, either individually or as a group, bring an action against a defaulting municipality, a judgment obtained in the action would be assessed against the city (as opposed to its utility service, or revenues therefrom) as the contracting entity, and recoverable from the city's general fund.

We now address the contention of WPPSS, Chemical Bank, and the City of Heyburn that the cities' indebtedness is excepted from the requirements of Idaho Const. Art. 8, § 3 by virtue of its being an "ordinary and necessary" expense. That proviso reads as follows: "Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state . . . ." In our interpretation of this language, we are benefitted by a rather extensive history of case law. We note at the outset that this proviso consists of two requirements: (1) that the expense be ordinary and necessary, and (2) that it be authorized by the general laws of the state. City of Pocatello v. Peterson, 93 Idaho 774, 777, 473 P.2d 644, 647 (1970). We will address the "ordinary and necessary" requirement first.

Early cases interpreted the "ordinary and necessary" language very narrowly. The court often looked to the amount of the expense in proportion to the city or county's revenue for that year. In County of Ada v. Bullen Bridge Co., 5 Idaho 79, 47 P. 818 (1896), the court stated,

> "If it is claimed that this expenditure comes within the proviso of section 3, article 8, of the constitution, we answer that a construction of that proviso, as well as of the entire section, was given by this court in Bannock Co. v. Bunting, 4 Idaho, 156, 37 Pac. 277, and we would suggest that an improvement involving an expenditure of nearly $40,000, where the revenue of the county for the year was only about $70,000, would not readily be classed as an 'ordinary and necessary expense.' It would be difficult, we apprehend, to name an expense under such a construction that would not be 'ordinary and necessary.' If a necessity existed for the bridge, there was no conceivable excuse for not complying with the plainly expressed provisions of the constitution and the statutes. If these provisions of law are to be ignored or defeated upon flimsy technicalities, it is

difficult to see what protection the people will have." *Id* at 90, 47 P. at 823.[19]

See also, Ball v. Bannock Co., 5 Idaho 602, 51 P. 454 (1897). Expenditures held *not* to be ordinary and necessary include: the construction of bridges, *Bullen Bridge, Dunbar, supra;* construction of a wagon road, McNutt v. Lemhi Co., 12 Idaho 63, 84 P. 1054 (1906); purchase of a water system, Woodward v. City of Grangeville, 13 Idaho 652, 92 P. 840 (1907); construction of a schoolhouse addition, Petrie v. Common School Dist., 44 Idaho 92, 255 P. 318 (1927); purchase of a street sprinkler, Williams v. City of Emmett, 51 Idaho 500, 6 P.2d 475 (1931). Expenditures held to be within the ordinary and necessary exception include: salaries of city officers and employees, Butler v. Lewiston, 11 Idaho 393, 83 P. 234 (1905); repair of city waterworks, Hickey v. City of Nampa, 22 Idaho 41, 124 P. 280 (1912); construction of a jail in a newly created county, Jones v. Power Co., 27 Idaho 656, 150 P. 35 (1915); maintenance of streets, Thomas v. Glindeman, 33 Idaho 394, 195 P. 92 (1921); cost of employing school teachers, Corum v. Common School Dist., 55 Idaho 725, 47 P.2d 889 (1935).

Comparison of these earlier cases reveals one clear distinction between those expenses held to be ordinary and necessary and those held not to be: *new* construction or the purchase of *new* equipment or facilities as opposed to repair, partial replacement or reconditioning of existing facilities. Thus, the court could hold that the city of Grangeville was not authorized, except by compliance with the requirements of Art. 8, § 3, to purchase an existing water system from the estate of a

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[19] In the *Bunting* case, the court held that the purchase of a site for a county courthouse, and building a courthouse, "is clearly not among the ordinary and necessary expenses of the county . . . . It is clear that, if the commissioners could incur a debt for a courthouse site at a cost of $4,000, they might purchase one at a cost of $10,000, and proceed to erect a courthouse at a cost of $20,000, all of which would be in direct violation of the constitution." *See,* Dunbar v. Board of Commrs., 5 Idaho 407, 49 P. 409 (1897). The *Bunting* court looked less to the nature of the expense than to the amount.

deceased city resident in the *Woodward* case, *supra*,[20] but could hold that the city of Nampa was authorized (without voter approval) to repair and restore its present water system after it was badly damaged in an attempt to put out a downtown fire in the *Hickey* case, *supra*. Similarly, the city of Moscow's decision to *improve* its existing waterworks system and build a water storage tank, to provide a "more adequate water supply" was within the application of Art. 8, § 3 of the Constitution. Durand v. Cline, 63 Idaho 304, 119 P.2d 891 (1941). *See also,* Miller v. City of Buhl, 48 Idaho 668, 284 P. 843 (1930), (purchase of electric generating system, to be paid for from receipts from sale of power and light, held to be required to comply with Art. 8, § 3); O'Bryant v. City of Idaho Falls, 78 Idaho 313, 303 P.2d 672 (1956), (entering into agreement with natural gas distribution system to provide gas for city residents and vicinity held to be covered by requirements of Art. 8, § 3, Idaho Const.); Straughan v. City of Coeur d'Alene, 53 Idaho 494, 24 P.2d 421 (1932), (purchase by city of municipal lighting plant, and of waterworks system, held to be within application of Art. 8, § 3); Reynolds Construction Co. v. County of Twin Falls, 92 Idaho 61, 487 P.2d 14 (1968), (construction of courthouse annex covered by Art. 8, § 3).

While it is true that recent cases dealing with application of Idaho Const. Art. 8, § 3, have interpreted the "ordinary and necessary" language more broadly,[21] they are not inconsistent with earlier case authority. In Hanson v. City of Idaho Falls, 92 Idaho 512, 446 P.2d 634 (1968), the court held that establishment of a "policeman's retirement fund" was within the ordinary and necessary proviso, reasoning that it was merely an extension of the city's salary compensation and support of its

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[20] "It will thus be seen that the ordinary and necessary expenses of said municipality may be contracted for by said city without any vote of the people, but where an expense is proposed to be incurred which exceeds the income and revenue provided for any year, such as the construction or purchase of a water system, or a part of such system, the same cannot be done without the assent of two-thirds of the qualified electors of said city." 13 Idaho at 660, 92 P. at 842.

[21] *See,* Moore, *Constitutional Debt Limitation, supra.*

municipal law enforcement staff. Early cases were clear in ruling that salaries of municipal employees and related expenses are ordinary and necessary. *See,* Corum v. Common School Dist., *supra;* Butler v. Lewiston, *supra.*

In City of Pocatello v. Peterson, 93 Idaho 774, 473 P.2d 644 (1970), the court held that while repair and renovation of a municipal airport were not "inherently 'ordinary and necessary expenses' " the particular facts of that case brought them within the constitutional category. In its opinion the court stressed the upkeep and maintenance aspect of the city's expenditure. The court noted that the passenger terminal was an "unsound structure." Thus, while construction of a "wholly new terminal building" (see dissent of McFadden, J., *id.* at 779, 473 P.2d at 649) might be viewed as an expenditure not traditionally considered ordinary and necessary, the court's emphasis on the obsolescence and unsafe condition of the twenty-year-old facility places it within the "repair or maintenance" line of case authority. The court may have considered the expenditure in light of the city's obligation to maintain a safe, sound structure and the concomitant potential legal liability for failure to do so, which liability might itself create an ordinary and necessary expense. *See,* Butler v. City of Lewiston, *supra.*

The question is whether the cities' belief that there would be inadequate power supplies several years in the future is sufficiently analogous to the cases which hold that repair or reconditioning of existing facilities is an ordinary and necessary expense. It is argued that the expenditure was certainly necessary in light of BPA's notice of insufficient power supplies by 1983. Although hindsight tells us the cities were mistaken (there has turned out to be more than adequate electrical power from the same facilities existing in the early to mid 1970's), there is no way the cities could have known otherwise from existing information. However, we need not decide whether the expenditure was "necessary" within the meaning of Art. 8, § 3, for we hold that it was not "ordinary." "Ordinary" means "regular; usual; normal; common; often recurring . . . not characterized by peculiar or unusual circumstances." *Peterson,*

supra, 93 Idaho at 778, 473 P.2d at 648. It would be difficult to apply these adjectives to the WPPSS agreement. It was a colossal undertaking, fraught with financial risk. It was open-ended: the cities could not have known what their ultimate debt or liability would be. One cannot stretch the meaning of "ordinary" to include an expense for which there could not be, until years later, certainty of limits. The funding agreement left the Idaho cities with extensive indebtedness—yet no ownership, and minimal control, and only the possibility of electricity. Further, the agreement was for the construction of nuclear power plants, at an expense unencountered in the history of these cities' power ventures. One could conceive of a number of words to describe this undertaking, but "ordinary" would not be one of them.

We turn now to the second requirement of the constitutional proviso: that the expenditure be authorized by the general laws of the state. While an Idaho municipality is authorized to "acquire, own, maintain and operate electric power plants, purchase electric power, and provide for distribution to the residents of the city", I.C. § 50-325, and may purchase for resale to BPA "electric power and energy" under a net-billing agreement, I.C. § 50-342, we can find no statutory authorization for the purchase of "project capability" where such purchase comprehends the payment of long-term indebtedness for which no power may be supplied, and for which no ownership interest is acquired. The municipality is neither acquiring, owning, maintaining, or operating a plant, nor purchasing electrical power. It is underwriting another entity's indebtedness in return for merely the possibility of electricity. Thus, we hold that the agreement entered into by the Idaho cities and WPPSS does not come within the ordinary and necessary proviso of Art. 8, § 3 of the Idaho Constitution, and that section consequently having application in this case, the agreement is void as to the cities, who were acting *ultra vires* by obligating their residents without an election and compliance with the constitution.

We note that we have had at issue before us only the agreement relating to Projects 4 and 5. The cities' authorization

to enter into Project 1, 2 and 3 agreements is not at issue, and as we have pointed out, the two sets of agreements are sufficiently different to make much of our holding not applicable even by analogy to the earlier agreements, which we perceive to be in the nature of power purchase contracts more than long-term debt obligations. Since we hold that the cities' agreements as to Projects 4 and 5 are void, it follows that the alternative writ of prohibition in these consolidated cases is hereby made permanent.

DONALDSON, C.J., SHEPARD and BISTLINE, J.J., concur.

BAKES, J., dissenting:

I cannot join in the majority opinion. If viewed at the time of inception, instead of with hindsight, the contracts under analysis here should withstand any constitutional attack the petitioners could muster. It is only because, through hindsight, the majority can see what a "bad deal" the cities have made that they now attempt to extricate these cities from their precarious position through a unique interpretation of our constitution as applied to the facts of this case. Clearly, the contracts under consideration comply with any constitutional requirement. Analysis under Art. 8, § 3, reveals that (1) the obligation under the agreements is not the type of obligations contemplated under Art. 8, § 3; and (2) that even if the above reason fails, the agreements should still be upheld under the "ordinary and necessary" exception to the requirement of a citizens' election. Analysis under Art. 8, § 4, and Art. 12, § 4, leads to the same conclusion. Those sections do not invalidate these agreements because (1) the agency with whom the cities contracted is a public agency, and those sections merely prohibit contracts with private entities; and (2) there can be no lending of the credit of a public entity if the general fund of that entity is not liable on the obligation. Because these agreements withstand scrutiny under all of these constitutional provisions, the agreements should be upheld.

This is not to say that the cities are liable on these contracts. Our only concern in this case is the constitutionality of the cities' actions in entering into these contracts. This opinion would not preclude the cities from asserting any defenses to formation of these contracts that they might bring in another forum. In fact, it appears from the record that these cities have been discharged by a Washington trial court because of the action of the Washington Supreme Court in invalidating the contracts as to the Washington defendants. We should not bend our own Constitution in an effort to release from liability public entities who have improvidently, but constitutionally, entered into contracts from which they may also be relieved because of contractual defenses.

I

A

The obligation "incurred" by the cities under these agreements is not the type of "indebtedness or liability" contemplated by Art. 8, § 3. That section contemplates the type of liability or indebtedness that will be repaid by the collection of an annual tax. Thus, the section provides some protection for the taxpayers who will be required to pay such annual tax. It requires cities to go to those taxpayers and obtain their assent to the liability or indebtedness incurred by submitting the matter to an election. However, under these agreements, no tax will ever by required. The liability in question is not payable from the general funds of the city. By the terms of the contract itself, it is payable only from revenues obtained from the sale by the cities of electric power. The sole source of revenue from which the cities are obligated to make payment to WPPSS is the electric utility rates charged only to customers of the electric utilities operated by the cities, most but not all of whom are located within the cities. No tax funds are ever involved under this contract. Because this obligation can never be a liability on the general city fund, it is not the type of liability contemplated under Art. 8, § 3; thus, Art. 8, § 3, should not render the agreement void.

B

Another reason exists that should validate the Participants' Agreements under Art. 8, § 3. That section provides for an exception to the requirement of a citizens' election where the liabilities are "ordinary and necessary expenses authorized by the general laws of the state." The agreements were contracts for the acquisition of electricity. These participant cities were lawfully in the business of providing electricity to their residents and surrounding areas, and faced with a future shortage of electricity, the entering into of these agreements to provide a future source of electricity was an "ordinary and necessary" function of a city's business of providing such electrical power.

This Court has recognized that the "ordinary and necessary" exception shall be applied on a case by case basis. The cases considered by this Court have defined "ordinary and necessary" in various ways.

> " 'Ordinary' means 'regular; usual; normal; common; often recurring . . . .' . . . 'Necessary' means 'indispensable.' . . . An expenditure, although not of a frequently recurring nature, may nonetheless be 'ordinary and necessary' " City of Pocatello v. Peterson, 93 Idaho 774, 778, 473 P.2d 644, 648 (1970).

This Court later defined "ordinary and necessary" as follows:

> "An expense is ordinary if *in the ordinary course of the transaction of municipal business,* or the maintenance of municipal property, *it may be and is likely to become necessary.*" (Emphasis added.) Thomas v. Glindeman, 33 Idaho 394, 195 P. 92 (1921).

In City of Pocatello v. Peterson, 93 Idaho 774, 473 P.2d 644 (1970), we considered the question of whether a contract for the expansion of an airport facility was a contract for "ordinary and necessary" expenses within the exception to Art. 8, § 3. This Court considered several factors in the peculiar factual circumstances and concluded that the city's lease of the airport facility was ordinary and necessary. Several of the factors considered were: (1) the fact that the city was author-

ized by law to operate an airport; (2) that the city had in fact been operating an airport for a considerable period of time; and (3) that the existing facilities were inadequate and would in the future become obsolete and unsafe. The Court then concluded that for all of these reasons the repair and improvement of Pocatello's airport facility constituted an ordinary and necessary expense, thus falling within the exception to Art. 8, § 3. In its conclusion, the Court noted the following:

> "Furthermore the repair and improvement of the Pocatello airport facility is essential for the proper growth and development of the area. This is especially so since the railroads, upon which public travel and communications were heavily dependent in yesteryear, are discontinuing passenger service to many cities." 93 Idaho at 779.

The factors noted in *City of Pocatello* in finding those expenses to be ordinary and necessary are also applicable in the contextual framework involved here. The cities here are authorized by law to operate electrical power plants and purchase electrical power for distribution to residents of the city. *See* I.C. §§ 50-325 and -342. All of these cities are in the business of distributing electrical power to their residents. Their residents are thus dependent upon these cities for their supply of electrical power. The source of power previously used by the cities was in effect becoming "obsolete," in that the BPA, from whom the cities had previously purchased their electrical power, had notified them that it would no longer be able to meet their electrical power needs by the early 1980's. The cities therefore were required to seek alternative sources of electrical power in order to continue service to their residents. All of these factors considered together indicate that this case is substantially similar to the question considered in *City of Pocatello v. Peterson, supra.* The liability incurred by the city was thus an ordinary and necessary expense, and the agreements do not violate Art. 8, § 3, of the Idaho Constitution and should not be struck down.

II

A

The majority opinion does not discuss Art. 8, § 4, and Art. 12, § 4, of the Idaho Constitution, but the agreements also withstand scrutiny under those sections. Those provisions read:

> "[Art. 8] § 4. County, etc., not to loan or give its credit.—*No* county, *city,* town, township, board of education, or school district, or other subdivision, *shall lend, or pledge the credit or faith thereof directly or indirectly, in any manner, to, or in aid of any individual association or corporation, for any amount or for any purpose whatever,* or become responsible for any debt, contract or liability of any individual, association or corporation in or out of this state." (Emphasis added.)

> "[Art. 12] § 4. Municipal corporations not to loan credit.—*No* county, town, *city* or other municipal corporation, by vote of its citizens or otherwise, *shall ever* become a stockholder in any joint stock company, corporation or association whatever, or *raise money for, or make donation or loan its credit to, or in aid of, any such company or association:* provided, that cities and towns may contract indebtedness for school, water, sanitary and illuminating purposes: provided, that any city or town contracting such indebtedness shall own its just proportion of the property thus created and receive from any income arising therefrom its proportion to the whole amount so invested." (Emphasis added.)

Art. 8, § 4, and Art. 12, § 4, of the Idaho Constitution, are both sections intended to limit the power of municipal corporations to lend or pledge their credit to outside entities. Art. 12, § 4, prohibits the lending of credit, but makes a specific exception for indebtedness for "school, water, sanitary and *illuminating purposes.*" Art. 8, § 4, "goes further and is more restrictive" than Art. 12, § 4, Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960). It

absolutely prohibits the lending or pledging of credit directly or indirectly for any purpose whatever.

These two constitutional provisions have been interpreted in numerous Idaho cases. This Court has interpreted these provisions as prohibitions upon the lending of credit in aid of "private" associations or corporations. *See* Board of County Comm'rs v. Idaho Health Facilities Authority, 96 Idaho 498, 531 P.2d 588 (1975); Village of Moyie Springs v. Aurora Mfg. Co., *supra;* School Dist. No. 8 v. Twin Falls County Mutual Fire Ins. Co., 30 Idaho 400, 164 P. 1174 (1917). As we stated in Boise Redevelopment Agency v. Yick Kong, 94 Idaho 876, 499 P.2d 575 (1972):

> "The purpose of such a prohibition is clear. Favored status should not be given any private enterprise or individual in the application of public funds. The proceedings and debates of the Idaho Constitutional Convention indicate a consistent theme running through the consideration of the constitutional sections in question. It was feared that private interests would gain advantages at the expense of the taxpayers. This fear appeared to relate particularly to railroads and a few other large businesses who had succeeded in gaining the ability to impose taxes, at least indirectly, upon municipal residents in western states at the time of the drafting of our constitution. we are led to the firm conviction that only private interests were intended to fall within the strictures of those sections relating to 'association,' 'corporation' and 'joint stock company.' " *id.* at 883-84.

In *Yick Kong* we were considering the constitutionality of the creation of a redevelopment agency intended to rehabilitate the downtown area of the City of Boise. We held that the redevelopment agency, being a public and not a private enterprise, did not fall within the strictures of Art. 8, §4, and Art. 12, §4. We recently reaffirmed *Yick Kong* in Idaho Falls Consolidated Hospitals v. Bingham County Board, 102 Idaho 838, 642 P.2d 553 (1982). There we said:

> "A review of the proceedings at the constitutional convention, the history of the west, and a similar statute that was in effect at the time the constitution was adopted, show that the delegates only sought to prevent private interests from gaining advantage at the expense of the taxpayer." 102 Idaho at 842.

In the present case WPPSS is not a private entity. Rather, it is a public corporation established by nineteen public utility districts in the State of Washington and the cities of Seattle, Tacoma, Richland and Ellensburg, and incorporated under the laws of the State of Washington. Thus, the evil sought to be avoided in Art. 8, § 4, and Art. 12, § 4, the lending of public credit to private enterprise, is not present here. Significantly, even if an incidental benefit to a profit-making enterprise is present, that in itself will not invalidate a program that has a public purpose. "Only if private interests are primarily benefited, must such programs with public goals be invalidated." Board of County Comm'rs v. Idaho Health Facilities Authority, *supra*. Here, although the argument may be made that certain private entities are benefited by the participation of the cities in the WPPSS agreement, the primary benefit of the agreements inures to the public users of electrical power. Thus, in the present case, and under these facts, there is no violation of Art. 8, § 4, or Art. 12, § 4.

A final reason for upholding these contracts lies in the arguments already presented. Art. 8, § 4, and Art. 12, § 4, both require a lending or pledging of the credit of the municipality. There can be no lending or pledging of that credit if the general fund itself is not liable on the obligation. As shown before, this obligation is payable only out of revenue from the utilities operated by the cities; thus, no general fund is liable. This is not the type of situation envisioned in these two articles of our Constitution.

Thus, under any analysis of these agreements and our Constitution, they should withstand scrutiny and should be enforced.

APPENDIX B

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IN THE SUPREME COURT OF THE STATE OF IDAHO

GARY ASSON and LERAE ASSON, *et al.* *Petitioners,* *—against—* CITY OF BURLEY, *et al.*, *Respondents.*	**CONSOLIDATED CASES** **Supreme Court No. 14719**
RICHARD H. BOHLE and PAULA BOHLE, *et al.*, *Petitioners,* *—against—* CITY OF RUPERT, *et al.*, *Respondents.*	**Supreme Court No. 14809**

MEMORANDUM IN SUPPORT OF CHEMICAL BANK'S PETITION FOR REHEARING

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MEMORANDUM IN SUPPORT OF CHEMICAL BANK'S PETITION FOR REHEARING

The decision of this Court filed September 26, 1983, holds that the Participants' Agreements for WPPSS Projects 4 and 5 executed by the cities of Bonners Ferry, Burley, Heyburn, Idaho Falls and Rupert are void because the cities, in entering into the agreements, failed to comply with Article 8, Section 3 of the Idaho Constitution.

The Court found that the agreements constituted "indebtedness or liability" incurred without the two-thirds vote of electors required by the constitutional provision, and that the agreements did not fall within the "ordinary and necessary expense" exception to the provision.

The writ of prohibition made permanent by the Court to effect its decision prohibits and restrains the five cities from

> "charging any electrical consumer any rate or charge that would inure to the payment of *any obligation,* liability or indebtedness relating to Nuclear Power Plant Projects Nos. 4 and 5 generated by the [Participants'] Agreements . . . ". (Emphasis added.)

The result of that writ is to wreak havoc with what heretofore the Federal and state constitutions have kept inviolate. The five Idaho cities have not only been freed from their contractual obligations; they have also been relieved of "any obligation" and allowed not to return any part of their share of the $2.25 billion paid for their benefit by bondholders all across this country.

That result cannot stand under the United States and State Constitutions. As the United States Supreme Court put it so directly:

> "The requirement that the property shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law for the

protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.' " *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago,* 166 U.S. 226, 236 (1897).

It is fundamental to American jurisprudence, to our whole system of law, that "the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government". *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 324 (1893).

Because of the serious Federal and state constitutional violations that have arisen from the sweeping away of the bondholders' rights and the failure of any conventional state remedies to redress it, Chemical Bank submits this memorandum in support of its motion pursuant to I.A.R. 42 for rehearing. We respectfully petition the Court upon rehearing to vacate the writ of prohibition made permanent by the Court's September 26 decision

Argument

I.

THE FEDERAL CONSTITUTIONAL RIGHTS OF THE BONDHOLDERS HAVE BEEN VIOLATED.

A. **Federal constitutional rights protect against the destruction of contractual expectations by a state.**

The Contract Clause, U.S. Const. Art. I, § 10, cl. 1, the Takings Clause, U.S. Const. Amend. V, and the Due Process Clause, U.S. Const. Amend. XIV, § 1, are interwoven constitutional guarantees all designed to protect the legitimate rights and expectations of property owners, including contractual rights and expectations, from infringement through state law or state action. The Contract Clause prohibits state

law from "impairing the obligations of contracts"; the Takings Clause prohibits the taking of private property for public use "without just compensation"; and the substantive protections of the Due Process Clause prohibit the deprivation of property "without due process of law".

As these doctrines have developed, their substantive protections, and the methods of analysis for applying those protections, have become largely overlapping. *See, e.g., Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 241 & n.12 (1978) (comparing Contract Clause and Due Process Clause); *U.S. Trust Co. v. New Jersey,* 431 U.S. 1, 14-15 (1977) (same); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922) (comparing Takings Clause and Due Process Clause); Note, "The Supreme Court, 1977 Term", 92 Harv. L. Rev. 57, 98 (1978) (comparing Contract Clause and Takings Clause); Note, "The Supreme Court, 1976 Term", 91 Harv. L. Rev. 70, 84 (1977) ("constitutional jurisprudence has tended to subsume the [contract] clause under the due process and takings provisions of the fifth and fourteenth amendments"). Three overlapping facets of the Contract Clause, the Takings Clause and the Due Process Clause are particularly relevant here.

First, all three constitutional provisions are restrictions on how the application of state laws can affect property rights. The Contract Clause and the Due Process Clause of the Fourteenth Amendment expressly apply to the states. The Takings Clause is applicable to the states through incorporation in the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 160 (1980); *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 122 (1978).

Moreover, it is well established that judicial action can constitute the "state action" that violates the Takings Clause or the Due Process Clause.

> "[A] judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and

> authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

Chicago, Burlington & Quincy Railroad Co. v. City of Chicago, 166 U.S. at 241. *See also id.* at 233-35. "[T]he Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate . . . ." *Hughes v. Washington,* 389 U.S. 290, 298 (1967) (Stewart, J., concurring). *See also Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. at 164 (Takings Clause). *Cf. Shelley v. Kraemer,* 334 U.S. 1, 14-18 (1948) (Equal Protection Clause).[1]

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[1] Early United States Supreme Court cases also applied the Contract Clause to rulings by courts, where those rulings were issued subsequent to the creation of a contract and impaired the obligation of the contract (including municipal bonds). *See, e.g., Ohio Life Ins. & Trust Co. v. Debolt,* 57 U.S. (16 How.) 416, 432 (1854) (opinion of Taney, C.J.); *Gelpcke v. City of Dubuque,* 68 U.S. (1 Wall.) 175, 206 (1864); *Havemeyer v. Iowa County,* 70 U.S. (3 Wall.) 294, 303 (1866); *Butz v. Muscatine,* 75 U.S. (8 Wall.) 575, 583-84 (1869); *Olcott v. Supervisors of Fond du Lac,* 83 U.S. (16 Wall.) 678, 690 (1873); *Pine Grove Township v. Talcott,* 86 U.S. (19 Wall.) 666, 678 (1874); *Douglass v. Pike County,* 101 U.S. 677, 687 (1880). *See generally* B. F. Wright, Jr., *The Contract Clause of the Constitution* at 236-42 (1938). *See also* Hale, "The Supreme Court and the Contract Clause: III", 57 Harv. L. Rev. 852, 862-63 (1944). More recently, however, the Court has restricted its application of the Contract Clause to state legislative action, distinguishing its earlier cases on other grounds. *See, e.g., Tidal Oil Co. v. Flanagan,* 263 U.S. 444, 451-54 (1924); *Barrows v. Jackson,* 346 U.S. 249, 260 (1953).

Chemical Bank does not believe that a judicial/legislative dichotomy in the application of the Contract Clause should be maintained in light of the now well-established understanding that states may not deprive persons of constitutionally protected property rights through judicial decision. Such a dichotomy is particularly unpersuasive given the United States Supreme Court's recent recognition of the overlapping coverage and analysis of the Contract Clause with substantive due process under the Fourteenth Amendment. *U.S. Trust Co. v. New*

Second, all three constitutional provisions include contractual rights as property rights to be protected. *See, e.g., U.S. Trust Co. v. New Jersey,* 431 U.S. at 16 (Contract Clause); *id.* at 19 n.16, 29 n.27 (Takings Clause); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. at 413-15 (Due Process Clause). "The inviolability of contracts, and the duty of performing them, as made, are foundations of all well-ordered society, and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed." *Murray v. Charleston,* 96 U.S. 432, 449 (1878).

All three constitutional provisions also reach legitimate "expectations" as part of the protected contractual property right. *See, e.g., Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979) (Takings Clause analysis looks at "interference with reasonable investment backed expectations"); *Penn Central Transportation Co. v. New York City,* 438 U.S. at 124 (looking at the "economic impact of the regulation on the [property owner] and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations"); *id.* at 127 ("a state statute . . . may so frustrate distinct investment-backed expectations as to amount to a 'taking' "); *Allied Structural Steel Co. v. Spannaus,* 438 U.S. at 246-50 (impairment of "legitimate contractual expectation" found to violate Contract Clause).

Thus, a contract right may not be so impaired as to take away "the quality of an acceptable investment for a rational investor". *W. B. Worthen Co. v. Kavanaugh,* 295 U.S. 56, 60 (1935).

Jersey, 431 U.S. at 14-15; *Allied Structural Steel Co. v. Spannaus,* 438 U.S. at 241 & n.12. Moreover, that dichotomy should not apply in this case, since the impairment here was undertaken by officials acting under color of state law.

It is unnecessary, however, to address here the propriety or scope of the judicial/legislative dichotomy under the Contract Clause. Since the protections of the Contract Clause have been recognized by the United States Supreme Court as the equivalent of substantive due process, the analysis and holdings of the Contract Clause cases must be considered as subsumed under the Due Process Clause, which plainly is applicable to officials acting under color of state law and state judicial decisionmaking relating to their conduct.

Constitutionally protected contractual expectations may arise from the contract itself, or they may arise from factors external to the literal terms of the contract. For example, the "contemporaneous state law pertaining to interpretation and enforcement" at the time the contract was entered into is part of the investment-backed expectations of the property owner. *See U.S. Trust Co. v. New Jersey,* 431 U.S. at 19 n.17; *W.B. Worthen Co. v. Kavanaugh,* 295 U.S. at 60. The conduct of government officials, even if insufficient to estop the government, may also "lead to the fruition of a number of expectancies embodied in the concept of 'property' " which cannot be taken without just compensation. *Kaiser Aetna v. United States,* 444 U.S. at 179. As one noted constitutional scholar has explained, the Constitution protects

> "not only what people *in fact expect* upon examining the body of positive [state] law, but also what they are *entitled* to expect, positive law to the contrary notwithstanding. . . . [T]he content of this normative entitlement in the area of private contracts is essentially coextensive with the reach of substantive due process. . . ."

L. Tribe, *American Constitutional Law* § 9-6, at 469 (1978) (emphasis in original) (footnote omitted).

Third, all three constitutional provisions override and invalidate any inconsistent state law pursuant to the Supremacy Clause. U.S. Const. Art. VI, § 2. Accordingly, the issue of whether the application of state law to particular facts is correct as a matter of state law is not dispositive of the issue of whether the Federal Constitution has been violated.

B. The bondholders' "investment-backed expectations" have been totally defeated here in violation of their rights under the Federal Constitution.

It is clear that the bondholders have property rights —contractual and "investment-backed expectations"—in the present case. Municipal bonds such as those involved in the present case have long been recognized to be contractual in

nature. *See, e.g., U.S. Trust Co. v. New Jersey,* 431 U.S. 1 (1977); *W. B. Worthen Co. v. Kavanaugh,* 295 U.S. 56 (1935); *Louisiana v. Pilsbury,* 105 U.S. 278 (1882); *Murray v. Charleston,* 96 U.S. 432 (1878). That this should be so is obvious from the nature of the arrangement: the Idaho cities promised to participate, and thus put their credit and financial resources behind the bonds, in exchange for the bargained-for benefit of public marketability of the bonds to finance construction of the two power plants. *See U.S. Trust Co. v. New Jersey,* 431 U.S. at 18.

Whatever else may be included within the contractual property right of the bondholders as derived from the various sources of "investment-backed expectations", it is clearly the case that the bondholders have a constitutionally protected right to obtain the return of their initial investment, plus the interest that equals the time value of that money while the defendants have had its use.

Those "expectations" are constitutionally protected against appropriation without compensation. The "expectations" have been taken or impaired in this case by the denial by the city and ratepayer petitioners that the bondholders have *any* cognizable interest remaining in their investment, a denial which has now been sanctioned by this Court's decision of state law.

The bondholders' constitutionally protected investment-backed expectations were established when they paid their money. They were not changeable depending upon the progress of the projects, whether wildly successful, a tragic failure, or something in between. Neither does the constitutional guarantee of those expectations rise, fall or fluctuate with the progress of the projects. So, for example, had the bondholders' investment been reinvested in an interest-bearing fund, no one would doubt their constitutional right to that fund even in the wake of the decisions made here on the *ultra vires* doctrine and the unavailability of other state remedies.

The fact that the participant cities may now say they are "empty-handed" with respect to the projects changes neither

the benefit they did obtain from the bondholders' investment nor the constitutional analysis protecting the bondholders' expectations. Those cities sought and received their share of the benefit of the bondholders' $2.25 billion investment. Plainly, the bondholders' money was absolutely essential to the nuclear power projects. The risk of failure of the projects was foreseen by everyone; the bondholders' money was nevertheless advanced on the strength of the hell-or-high-water commitments made by the cities. The projects were started and were continued for years because the cities wanted them and more and more bonds were sold so that the cities could further pursue their benefit.

The bondholders never intended to make a gift to the participants. Rather, the bondholders made an investment, based on the representations of the participants—including the Idaho cities—concerning those participants' performance under the contract. Even though the cities have now obtained a judicially sanctioned release from their obligations, they are at a minimum no longer entitled to keep the bondholder's investment. Keeping that investment would be, as bluntly put by the United States Supreme Court, "an act of spoliation" which must not occur because "[d]ue protection of the rights of property has been regarded as a vital principle of republican institutions". *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago,* 166 U.S. at 235-36.

Using language of special force and application here, the Supreme Court of the United States long ago rejected, as a matter of Federal Constitutional law, the notion that the cities here could simply walk away from their obligations *and* not repay the money:

> "The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being in the undertaking of a State or city to pay, a reservation of a sovereign right to withhold

> payment, the contract should be regarded as an assurance that such a right will not be exercised. *A promise to pay, with a reserved right to deny or change the effect of the promise is an absurdity.*"

Murray v. Charleston, 96 U.S. at 445 (emphasis supplied), *quoted with approval in U.S. Trust Co. v. New Jersey,* 431 U.S. at 19 n.23. And the Federal Constitution guards specifically against the "absurdity" of "transform[ing] private property into public property without compensation". As the United States Supreme Court held in *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. at 164:

> *"a State, by ipse dixit, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent."* (Emphasis supplied.)

See also Hughes v. Washington, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring) ("a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all").

The nature of the interference with constitutionally protected property rights here is readily apparent by a comparison with the facts of other cases in which impermissible deprivations of property were found. For example, in the recent case of *U.S. Trust Co. v. New Jersey,* 431 U.S. 1 (1977), the Supreme Court struck down the retroactive repealing of a statutory covenant between New York and New Jersey that had limited the ability of the Port Authority to subsidize rail passenger transportation from revenues and reserves. Municipal bonds, for which those revenues and reserves were pledged as security, had been issued after the statutory covenant had been enacted, and the statutory covenant had become part of the contract rights of the bondholders. However, the covenant was only one of three security measures to limit the Port Authority's deficit, and it could only be described as "not

superfluous". *Id. at 19.* Nevertheless, even though "no one can be sure precisely how much financial loss the bondholders suffered" as a result of the statutory repeal, the Court held that the repeal unconstitutionally "impaired the obligation of the States' contract". *Id.* at 17-19.[2]

Moreover, unlike the situation here, where the bondholders' investment has been totally misappropriated without any justification, the impairment involved in that case was sought to be justified by the states' concern about their ability to finance mass transportation, energy conservation and environmental protection—which the Supreme Court found were "goals that are important and of legitimate public concern". *Id.* at 28. Nevertheless, the Supreme Court found the impairment of contractual expectations unconstitutional, because "a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors". *Id.* at 29.

Similarly, in *W. B. Worthen Co. v. Kavanaugh,* 295 U.S. 56 (1935), the Supreme Court invalidated a statute that altered certain remedies for a mortgage that served as security for municipal bonds. The Court noted that "[n]ot even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected." *Id.* at 60. The Court concluded that "[w]ith studied indifference to the interests of the mortgagee or to his appropriate protection [the state legislators] have taken from the mortgage the quality of an acceptable investment for a rational investor". *Id.* The various changes in remedies, including timing and penalties, were "an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security". *Id.* at 62.

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[2] The Court also noted that no compensation had been paid for the elimination of the security measure from the contract rights. 431 U.S. at 19 & n.16.

And again, in *Armstrong v. United States,* 364 U.S. 40 (1960), the Supreme Court found an unconstitutional taking when government action rendered state law liens unenforceable The liens became unenforceable due to sovereign immunity because the Federal Government had taken possession of the materials to which the liens attached. "The result of this was a destruction of all petitioners' property rights under their liens, although . . . the liens were valid and had compensable value." *Id.* at 46. Whether or not the Government had intended to extinguish the liens, it had to pay for the value of the liens pursuant to the Takings Clause. *Id.* at 48-49.

The "destruction of all . . . property rights" of the bondholders in the present case is easily measured and is immense. When the result in Idaho is coupled with the situation elsewhere, the bondholders have had taken away from them $2.25 billion plus interest. This is not a case in which a few provisions concerning the bonds have been changed, as was true in *U.S. Trust Co. v. New Jersey* and *W. B. Worthen Co. v. Kavanaugh.* Put simply, the bonds here have been rendered worthless. And the amount of the "total destruction . . . of all value", *Armstrong v. United States,* 364 U.S. at 48, has been staggering; $2.25 billion plus interest is plainly the "full and perfect equivalent for the property taken" from the bondholders. *Monongahela Navigation Co. v. United States,* 148 U.S. at 326. Thus the taking and impairment of contractual rights and expectations here substantially outweigh the takings and impairments found unconstitutional in case after case decided by the United States Supreme Court on this issue.

There is no claim here that the Idaho cities cannot pay back the bondholders; they simply do not want to do so. But the United States Supreme Court has held flatly that "a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors". *U.S. Trust Co. v. New Jersey,* 431 U.S. at 29.

Chemical Bank does not assert that municipal bond contracts can never be altered in any way if, for example,

municipalities become insolvent. The bondholders do assume some risks, and the risk of insolvency, involving the bondholders' assessment of the municipalities' creditworthiness, is legitimately part of the bondholders' investment decision. But even in an insolvency, which is not this case, bondholders cannot simply be stripped of all of their property rights with not even an attempt at recompense, for that is a risk they do not assume and one the Constitution squarely protects against.

For example, in *Faitoute Iron & Steel Co. v. City of Asbury Park,* 316 U.S. 502 (1942), the United States Supreme Court found that the constitutional property rights of non-consenting bondholders were not violated when they were forced to participate in a workout plan for a bankrupt municipality in which new bonds with lower interest rates were exchanged for the old bonds. The Court stressed, however, that the plan had been approved by 85% of the creditors, and the new bonds had "substantial" value whereas the old bonds had "little value". *Id.* at 513. Noting that "a most depreciated claim of little value has, by the very scheme complained of, been saved and transmuted into substantial value", *id.* at 516, the Court found that no contractual right had been unconstitutionally impaired.

The present case is a far cry from the facts of *Faitoute.* Yet the United States Supreme Court has pointedly noted that *Faitoute* is "[t]he only time in this century that alteration of a municipal bond contract has been sustained by this Court". *U.S. Trust Co. v. New Jersey,* 431 U.S. at 27. *See also Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 103 S. Ct. 697, 705 n.14 (1983) ("When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets."), citing *U.S. Trust Co. v. New Jersey, W. B. Worthen Co. v. Kavanaugh* and *Murray v. Charleston.*

C. The bondholders' constitutional rights can be protected even though the Idaho cities' agreements have been held to be void.

We do not argue here that, as a matter of constitutional law, a state court cannot hold the actions or contracts of a municipality *ultra vires* and, therefore, unenforceable. Of course, such a result can occur. But that is the beginning, not the end, of the analysis, for to hold that there was no enforceable contract does not mean the bondholders cannot get their money back.

Put simply, there is no reason to attempt to sweep aside the bondholders' constitutional claim by extending the *ultra vires* doctrine to extinguish all the rights of the bondholders. If the *ultra vires* ruling can be viewed as legitimate state regulation to save citizens from the unauthorized acts of public officials, the contract can be disavowed and no further performance required under it, but the bondholders cannot be denied the right to have their money returned as "just compensation". The bondholders may not get the benefit of their bargain because of the *ultra vires* decision, but forced deprivation of *all* rights to their property takes governmental regulation too far. Put another way, this Court's decision exalts the rights of the Idaho cities and ratepayers, as the Court perceived them under Article 8, Section 3 of the Idaho Constitution, in complete derogation of the bondholders' rights under both the Federal and state constitutions. That conflict need not occur because this Court can give full force to the limitation on municipal indebtedness set forth in Article 8, Section 3 and still provide the bondholders with the remedy to which they are constitutionally entitled.

Moreover, if the Court gives exclusive attention to Article 8, Section 3, without giving concomitant consideration to the protections afforded by the Federal and state Takings, Contract and Due Process clauses, it will violate the fundamental precept of constitutional and statutory construction that provisions applying to the same subject must be considered *in pari materia. See Idaho Telephone Co. v. Baird,* 91 Idaho 425, 423 P.2d 337, 341 (1967).

Legitimate governmental regulation must coexist with freedom from governmental confiscation without compensation; otherwise, as the United States Supreme Court has held in an opinion written by Justice Holmes, "the contract and due process clauses are gone":

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. *But obviously the implied limitation must have its limits, or the contract and due process clauses are gone.* One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922) (emphasis added).

Add further:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong public desire to improve the public conditions is not enough to warrant achieving the desire by

a shorter cut than the constitutional way of paying for the change." *Id.* at 415-16.

The *Ultra vires* doctrine may limit the bondholders' contract rights, but it cannot constitutionally devour all their stake as well.

The whole point in the Taking, Due Process and Contract Clauses is that individuals are to be protected from being forced by government action to bear a burden that should be borne by a larger community represented by government:

> "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Armstrong v. United States, 364 U.S. 40, 49 (1960), quoted with approval in *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 163 (1980). *See also Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979); *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978).

That is the bedrock constitutional guarantee we ask this Court to enforce.

II.

THE STATE CONSTITUTIONAL RIGHTS OF THE BONDHOLDERS HAVE BEEN VIOLATED.

The Idaho Constitution has similar protections that forbid deprivation of the bondholders' property rights. Article 1 §13 provides that "[n]o person shall . . . be deprived of life, liberty or property without due process of law". Article 1, §14 provides that "[p]rivate property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor". And Article

1, §16 provides that "[n]o . . . law impairing the obligation of contracts shall ever be passed".[3]

The scope of these state constitutional guarantees is virtually identical to their Federal counterparts. *See, e.g., Roark v. City of Caldwell,* 87 Idaho 557, 394 P.2d 641 (1964); *Straus v. Ketchen,* 54 Idaho 56, 28 P2d 824 (1933); *Highway Dist. No. 1 v. Fremont County,* 32 Idaho 473, 185 P. 66 (1919).

Idaho's constitutional provisions, like their Federal counterparts, include contractual expectations within the realm of protected property rights. This Court has afforded such protection specifically in the context of municipal bonds:

> "The bondholders have a right to be paid their money when due and are protected from any change in the law which would defeat it." *Highway Dist. No. 1 v. Fremont County,* 32 Idaho 473, 185 P. 66, 67 (1919).

The Court has also recognized that complete defeasance of a property right, as has occurred here, violates the constitutional right to *some* remedy to protect that right:

> "While the remedy [for return of money] may be modified at the discretion of the legislative body, it cannot be taken away, for *the right to property necessarily implies a right to process of law to protect it." Fidelity State Bank v.*

---

[3] The constitutions of the other states in which project participants are located—Washington, Oregon, Montana and Wyoming—have comparable provisions. *See* Washington Const. Art. I, § 3 (due process clause), § 23 (contract clause), § 16 (takings clause); Oregon Const. Art. I, § 10 (due process clause), § 18 (takings clause), § 21 (contracts clause); Montana Const. Art. II, § 17 (due process clause), § 29 (takings clause), § 31 (contract clause); Wyoming Const. Art. 1, § 6 (due process clause), § 33 (takings clause), § 35 (contract clause).

All of these constitutional provisions protect the bondholders. By discussing Idaho constitutional law in this memorandum, we do not suggest that Washington constitutional law does not also protect the holders of bonds issued through a Washington municipal entity; however, since the constitutions of all the states in which participants exist protect the bondholders, discussion of Idaho law is appropriate.

North Fork Highway Dist., 35 Idaho 797, 209 P. 449 (1922).

Thus, the Idaho Constitution no more tolerates deprivation of property rights than does the Federal Constitution, and " 'where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief' ". *Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 392 (1971), quoting *Bell v. Hood,* 327 U.S. 678, 684 (1946).

III.

REHEARING SHOULD BE GRANTED FOR CONSIDERATION OF THE LEGAL AND EQUITABLE ISSUES NOT ADDRESSED IN THE COURT'S DECISION.

This Court's September 26 decision addressed only the contention that the Idaho cities' Participants' Agreements were void under Article 8, Section 3 of the Idaho Constitution. The Court's holding was limited to that issue. The Court did not specifically decide the other legal, equitable and constitutional issues that were before it.

The writ of prohibition issued by the Court sweeps far more broadly than the *ultra vires* doctrine on its face allows. As the Court is aware, the language of the writ originated almost a year before the decision in this case, as part of the petitioners' original applications for relief.

Chemical urges the Court to address on rehearing the legal and equitable issues raised by the parties but not discussed in the September 26 decision.

Those issues are serious and they are not made irrelevant by the *ultra vires* decision. For example, the "estoppel" provision of Article 8 of the Uniform Commercial Code specifically applies here, as is made clear by the Comment to the Official Text of the Provision:

"A long and well established line of Federal cases recognizes the principle of estoppel in favor of bona fide

purchasers where municipalities issue bonds containing recitals of compliance with governing constitutional and statutory provisions, made by the municipal authorities entrusted with determining such compliance. . . . This section follows the case law trend . . . ." I.C. § 28-8-202 (1980), Comment 6.

Chemical also asserts that the issues of common law estoppel, waiver, ratification, laches, unjust enrichment and restitution preclude entry of the writ, as previously argued to this court.

The Court should fully consider those issues on rehearing. If the result is to permit an adequate remedy to the bondholders under traditional state law principles, the serious constitutional problems raised in the preceding sections of this memorandum may be avoided.

CONCLUSION

For the reasons stated above, Chemical Bank's petition for rehearing should be granted.

Respectfully submitted this 31st day of October, 1983.

CLEMONS, COSHO & HUMPHREY, P.A.
By: /s/ HOWARD HUMPHREY
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APPENDIX C

APPENDIX C

IDAHO SUPREME COURT/COURT OF APPEALS

GARY ASSON, ET AL.,
Petitioners,

v.

CITY OF BURLEY, ET AL.,
Respondents.

ORDER

NO. 14719

RICHARD H. BOHLE, ET AL.,
Petitioners,

v.

CITY OF RUPERT, ET AL.,
Respondents.

NO. 14809

COUNSEL:

The Court has ORDERED that the PETITION FOR REHEARING BY INTERVENOR-RESPONDENT CHEMICAL BANK filed October 17, 1983 of the Court's Opinion issued September 26, 1983 be, and hereby is, DENIED.

DATED this 4th day of November, 1983.

By Order of the Supreme Court

/s/ FREDERICK C. LYON

cc: Counsel of Record

Frederick C. Lyon, Clerk
Supreme Court/Court of Appeals
State of Idaho

APPENDIX D

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-578

CHEMICAL BANK,

Petitioner,

v.

GARY ASSON, ET UX, ETC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 2, 1984.

/s/ WILLIAM H. REHNQUIST

Associate Justice of the Supreme Court of the United States

Dated this 23rd
day of January, 1984.

APPENDIX E

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-585

WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioner,

v.

GARY ASSON, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 2, 1984.

/s/ WILLIAM H. REHNQUIST

Associate Justice of the Supreme
Court of the United States

Dated this 24th
day of January, 1984.

APPENDIX F

APPENDIX F

Affiliates and Subsidiaries (Except Wholly-owned Subsidiaries) of Chemical Bank

Chemical New York Corporation
Chemical Bank (Middle East) S.A.
Chemical Bank, A.G.
Chemical Commercio E Servicos, Ltd.
MCL and Co., Ltd.
Witan Enterprises, Inc.
Woodmere Enterprises, Inc.
Arrendadora Del Atlantico S.A.
Compania Arrendamento De Financiera, Arfin S.A.
Far East Chemco Leasing & Finance Corp.
P.T. Chemco Graha Sejahtera Leasing
Noroeste Chemical, S.A.
C.B. Insurance Services Ltd.
Chemical Asia, Ltd.
Chemical Bank Hong Kong Nominees, Ltd.
Apartmentos Boulvard, S.A.
Banco General De Negocias, S.A.
Banco Noroeste De Investimento
Banque Internationale Du Congo
Bank of New Providence Ltd.
Chemical Bank/Howard De Walden
Chemical Commercio E Servicos LTDA
Empresa Minera De Mantos Blancos, SA
Far East Bank and Trust Co.
Industrialization Fund of Finland, Ltd.
Inversiones Sudamericana, SA
Leyland Italia Finanziaria, SpA
Nalin Ind. Sendirian Berhad
Northwest Iron Co. Ltd., Delaware, U.S.A.
Private Export Funding Corp., U.S.A.
Private Investment Co. for Asia
Phoenix Travel (Strand) Limited

P.T. Multinational Finance Corp.
Saehan Merchant Banking Corp.
Sanluis Financial and Investment Co., Ltd.
Sifida
Sociedad Anonima Escuela Campo Alegre
Sociedad Financiera Exterior, CA
ChemCredit Sendirian Berhad
Florida National Banks of Florida, Inc.
Gulf Stream Aero Space
S.W.I.F.T.

APPENDIX G

APPENDIX G

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 10, clause 1, of Article I of the United States Constitution provides:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

Article 8, Section 3 of the Idaho Constitution provides:

"Limitations on county and municipal indebtedness.—No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two thirds (⅔) of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provisions shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within thirty (30) years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state and provided further that any city may own, purchase, construct, extend, or equip, within and without the corporate limits of such city, off street parking facilities, public recreation facilities, and air navigation facilities, and for the purpose of paying the cost thereof may, without regard to any limitation herein imposed, with the assent of two thirds (⅔) of the qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by, such facilities as may be prescribed by law, and provided further, that any city or other political subdivision of the state may own, purchase, construct, extend, or equip, within and without the corporate limits of such city or political subdivision, water systems, sewage collection systems, water treatment plants, sewage treatment plants, and may rehabilitate existing electrical generating facilities, and for the purpose of paying the cost thereof, may, without regard to any limitation herein imposed, with the assent of a majority of the qualified electors voting at an election to be held for

that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by such systems, plants and facilities, as may be prescribed by law; and provided further that any port district, for the purpose of carrying into effect all or any of the powers now or hereafter granted to port districts by the laws of this state, may contract indebedness and issue revenue bonds evidencing such indebtedness, without the necessity of the voters of the port district authorizing the same, such revenue bonds to be payable solely from all or such part of the revenues of the port district derived from any source whatsoever excepting only those revenues derived from ad valorem taxes, as the port commission thereof may determine, and such revenue bonds not to be in any manner or to any extent a general obligation of the port district issuing the same, nor a charge upon the ad valorem tax revenue of such port district."

83-1619

No.

IN THE
Supreme Court of the United States
October Term 1983

CHEMICAL BANK and
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioners,

v.

GARY ASSON, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF IDAHO

OPINION OF THE SUPREME COURT OF THE STATE OF OREGON IN DeFAZIO v. WASHINGTON PUBLIC POWER SUPPLY SYSTEM

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IN THE SUPREME COURT OF THE STATE OF OREGON

PETER DEFAZIO, DAVID DIX, LESLIE RATLEY, GWEN E. ROSS, WILLIAM F. PALMER, FRED MCDANIEL, NORMA MCDANIEL, FREDERICK B. SIMMONS, ROBERT R. DAVIS, JOHN C. MONTGOMERY, ROBERT N. FAUGHT, MARY BOYERSMITH, LLOYD LARRY ROBERSON, HAROLD LOROY DAVIS, FRED J. STIGALL, PAUL M. STEWART, HAROLD ELLER, TERRY BOLLENBAUGH, GARY W. ENSIGN, WILL BROWN, RHONDA SPARKS, BONNIE CHARLES, MICHAEL FAUGHT, GLENN SOFGE, WILLIAM E. MORRISETTE, and JANICE M. MORRISETTE (Springfield Ratepayers);

CASCADE STEEL ROLLING MILLS, INC., AN OREGON CORPORATION; CASCADE TRACTOR & IMPLEMENT CO., AN OREGON CORPORATION; MCDANIEL FEED & GRAIN CO., AN OREGON CORPORATION; JACK WRIGHT; WALDO FARNHARN; JOHN JANKOWSKI; CHARLES E. COLVIN; A.E. HURL; CHUCK NEILSON; STAN AMUNDSON; MERLE LINGLE; HANS SIMON; JERRY LUCAS; WILLIAM B. NOURSE; DOYLE SMITH; CHESTER MCDONOUGH; EZRA KOCH; BILL O'DELL; GARY BROOKS; CHESTER GIBSON; DEL CASTEEL; (McMinnville Ratepayers);

Plaintiffs-Respondents/
Cross-Appellants,

THE CITY OF DRAIN, A MUNICIPAL CORPORATION (Drain):

CANBY UTILITY BOARD, AN INDEPENDENT GOVERNMENTAL SUBDIVISION OF THE CITY OF CANBY, A MUNICIPAL CORPORATION (Canby Utility Board);

THE CITY OF BANDON; A MUNICIPAL CORPORATION (Bandon);

THE CITY OF CASCADE LOCKS, A MUNICIPAL CORPORATION (Cascade Locks);

DONALD MAPLES; JOHN BENDELE; JACK BARBER; and CHARLES ROBERT MILLER (Drain Ratepayers);

Plaintiffs-Respondents,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, A WASHINGTON MUNICIPAL CORPORATION (WPPSS);

CITY OF SPRINGFIELD, A MUNICIPAL CORPORATION, ACTING BY AND THROUGH THE SPRINGFIELD UTILITY BOARD (Springfield);

CITY OF MCMINNVILLE, A MUNICIPAL CORPORATION, ACTING BY AND THROUGH ITS WATER & LIGHT COMMISSION (McMinneville);

CITY OF MILTON-FREEWATER, A MUNICIPAL CORPORATION (Milton-Freewater);

Defendants-Appellants/
Cross-Respondents,

NORTHERN WASCO PEOPLE'S UTILITY DISTRICT, A MUNICIPAL CORPORATION AND PEOPLE'S UTILITY DISTRICT OF THE STATE OF OREGON;

TILLAMOOK PEOPLE'S UTILITY DISTRICT, A MUNICIPAL CORPORATION AND A PEOPLE'S UTILITY DISTRICT OF THE STATE OF OREGON;

CLATSKANIE PEOPLE'S UTILITY DISTRICT, A MUNICIPAL CORPORATION AND PEOPLE'S UTILITY DISTRICT OF THE STATE OF OREGON; and

CENTRAL LINCOLN PEOPLE'S UTILITY DISTRICT A MUNICIPAL CORPORATION AND PEOPLE'S UTILITY DISTRICT OF THE STATE OF OREGON,

Defendants-Respondents.

* * * * *

(TC 16-81-11344; CA A26721; SC 29649)

In Banc

Certification from the Court of Appeals.*

Argued and submitted June 9, 1983.

James H. Clarke, Portland and Bruce Smith, Eugene, argued the cause and submitted brief for Defendant-Appellant/Cross-Respondent Washington Public Power Supply System. With them on the brief were Frank Gibson and Cass, Scott, Woods & Smith, Eugene; David H. Wilson, Jr. and Spears, Lubersky, Campbell, Bledsoe, Anderson & Young, Portland; Richard C. Yarmuth and Culp, Dwyer, Guterson & Grader, Seattle.

Garry P. McMurry, Portland, argued the cause and submitted brief for Defendants-Appellants/Cross-Respondents Cities of Springfield, Milton-Freewater and McMinnville. With him on the brief were Peter A. Mersereau, James A. Fitzhenry and Rankin, McMurry, VavRosky & Doherty, Portland; Douglas E. Hojem and Corey, Byler & Rew, Pendleton; David C. Haugeberg, Gary A. Rueter and Haugeberg & Rueter, McMinnville.

Robert L. Ackerman, Springfield, argued the cause and filed brief for Plaintiffs-Respondents/Cross-Appellants Springfield Ratepayers. With him on the brief were Ackerman, DeWenter & Huntsberger, Springfield, and Lawrence D. Salmony, Certified Law Student, Springfield.

Martha L. Walters, of Johnson, Harrang & Swanson, Eugene, argued the cause for Plaintiffs-Respondents City of Drain, Drain Ratepayers and City of Bandon. With her on supplemental briefs were John H. Hammond, Jr., Oregon City, representing Plaintiff-Respondent Canby Utility Board and Wilford K. Carey, Jr., Hood River, representing Plaintiff-Respondent City of Cascade Locks.

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* On certification from the Court of Appeals by order dated May 24, 1983.

John R. Faust, Jr., Portland, argued the cause and filed brief for Defendants-Respondents Central Lincoln People's Utility District and Clatskanie People's Utility District. With him on the brief were Donald A. Haagensen, Mildred J. Carmack and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland. With him on memorandum of additional authority was George P. Winslow, Jr., Tillamook, representing Defendant-Respondent Tillamook People's Utility District. With him on additional authorities was Stanley D. Heisler, The Dalles, representing Defendant-Respondent Northern Wasco People's Utility District.

Willard L. Cushing, McMinnville, argued the cause and filed brief for Plaintiffs-Respondents/Cross-Appellants City of McMinnville Ratepayers. With him on the brief was Cushing, Johnstone & Peterson, P.C.

LINDE, J.

The decision of the circuit court is reversed and the case remanded to that court for entry of a judgment and such further proceedings as may be necessary.

Lent, Linde and Roberts, JJ., filed a concurring opinion.

Peterson, C.J., filed a concurring opinion.

LINDE, J.

In 1976, the Washington Public Power Supply System and 88 governmental and cooperative entities in six states entered into a set of agreements under which the system, hereafter designated WPPSS, would construct and operate two nuclear-powered generating plants, Washington Nuclear Projects (WNP) 4 and 5, and the participating entities, referred to as the "participants," would be entitled to fractions of the power generating potential of these plants in return for specified financial obligations. The present litigation concerns the question whether various Oregon participants could legally commit themselves to the terms of these agreements. Upon suit brought in 1981 by ratepayers of the City of Springfield, one of the participants, later joined by a number of other private and municipal plaintiffs, the circuit court rendered a judgment declaring the Participants' Agreements executed by seven cities and four People's Utility Districts to be *"ultra vires,* void and invalid." Defendants appealed, and we accepted certification of the appeal by the Court of Appeals to this court pursuant to ORS 19.210 and ORAP 17.05.

I. THE PARTIES' POSITIONS

Because some of the issues are common to several parties and others are not, it is necessary to sort out the parties' positions in this action.

The action began with a complaint filed on December 22, 1981 by plaintiffs DeFazio, Dix, and Ratley, as consumers of electricity distributed by the Springfield Utility Board, an agency of the City of Springfield, against the City of Springfield and the Washington Public Power Supply System, alleging the invalidity of the city's agreement with WPPSS and seeking declaratory relief. During the months of March to May, 1982, motions to intervene were filed by the cities of Drain, Bandon, Cascade Locks, Milton-Freewater, McMinnville, and the Canby Utility Board, by ratepayers served by the cities of Drain and McMinnville, and by the Clatskanie, Central Lincoln, Tilla-

mook and Northern Wasco People's Utility Districts (PUDs). The circuit court allowed these motions on May 26, 1982, and the parties filed an amended consolidated complaint on July 13, 1982.

Although the procedure placed among the defendants some who deny the validity of the agreement, specifically the PUDs, no question is raised about this procedure. Rather than refer to the parties as plaintiffs and defendants, we ordinarily shall refer to WPPSS as the main proponent of the Participants' Agreements, joined in part by the cities of Springfield, McMinnville, and Milton-Freewater, and to the opponents respectively as the ratepayers, the cities, and the districts or PUDs.

The ratepayers and some of the cities contend that they lack charter authority to enter into the agreements and that special statutory procedures were the exclusive means for joining with others in financing generating facilities. They also contend that by promising unconditionally to pay a share of the project costs whether or not they received any electricity in return the cities incurred debts that may only be incurred by charter amendments or other consent of their qualified voters, and that they unconstitutionally invested in or lent their credit to WPPSS. Finally, they attack the agreements as unlawfully delegating the authority of city officials over electric rates by committing future rates to cover whatever payments would be required under the agreements.

The cities of Springfield, Milton-Freewater, and McMinnville deny these contentions. Among other arguments they maintain that the Participants' Agreements imposed no obligation on the participants to pay for construction costs, or debt service on such costs, if the projects were terminated before commencing operation, as WNP 4 and 5 in fact were. The actual legal consequences of the termination are not before us in this litigation, because the plaintiffs sued for a declaration that the Participants' Agreements were unlawful when they were made.

The PUDs argue that the obligations assumed in the Participants' Agreements constituted long-term indebtedness of the PUDs equivalent to revenue bonds and could be accomplished only with approval by the PUDs qualified voters. Like the other opponents, the PUDs contend that they could join with others in financing the projects only under statutes that were not followed, that they lacked authority to guarantee the debts of other entities such as WPPSS, that the agreements were an unconstitutional investment or lending of credit, and that the agreements unlawfully delegated their authority over their operations and electric rates. They also claim that the agreements were void as being against the public policies represented by these legal restrictions.

The proponents reject all attacks on the transactions, maintaining that the agreements were purchase contracts within the ordinary legal authority of the cities and PUDs. They contend in turn that plaintiffs' claims should have been dismissed as barred by laches or by estoppel.

The logical sequence is to take up, first, a challenge to the timing of the plaintiffs' action; then issues of the cities' and districts' authority, then limitations on that authority found in their charters or in statutes, and finally constitutional limitations. In this instance, issues common to all parties will precede some arguments that depend on separate provisions governing different participants. Because the court is in disagreement on the analysis of the timing issue, that discussion appears at the end of the opinion.

Each of the substantive positions has been exhaustively briefed and argued with great ability and, taken individually, with much persuasive force. The briefs and supplements total 1,513 pages without conspicuous waste, and an opinion responding to each argument in detail would threaten to become nearly as long.

The major arguments, however, have a common theme. There is no important disagreement about the facts. There is substantial agreement about much of the governing law. Some

contentions do not require extensive discussion. For these reasons we shall not discuss all the decisions and other informative sources that have been cited. The major arguments hinge on characterizing the agreements by which the participants undertook to reimburse WPPSS from their power revenues for the costs of financing, building, and operating two nuclear power plants in return for a share of whatever electric power, if any, those plants would deliver to the region's distribution grid.

The proponents contend that the agreements are what they purport to be: contracts to assure the participating utilities of a share of future thermal power generation that WPPSS would undertake to produce, contracts executed with the recognition that the undertaking might fail but that it could not be attempted unless the contracts covered the costs of an unsuccessful attempt. The opponents describe the agreements as an attempt to disguise substance by form, a poorly camouflaged effort to obtain revenue financing of the proposed plants by the participants while circumventing the voting procedures and debt limitations by which statutes, charters, and constitutions seek to guard against such fiscal folly. The proponents insist that it is perfectly proper to structure transactions within legally available forms and that these forms must remain reliable under the stress of failure.

Certainly these transactions were designed and piloted on their way with every effort to stay in an apparently open channel among the legal shoals; they had to be, to reach the financial markets. But the opponents contend that the design, whether born of excess optimism or of desperation, actually sank at its launching.

For the reasons that follow we hold that the local officials who entered into the challenged agreements in 1976 had legal authority to do so, and that in doing so they did not violate constitutional or other legal prohibitions. We therefore reverse the circuit court. This proceeding involves no question of the legal consequences and present enforceablility of the agreements in the light of developments after the agreements were executed, and we express no view thereon.

II. THE PARTICIPANTS' AGREEMENTS

The Washington Public Power Supply System, organized in 1957, is a municipal corporation and a "joint operating agency" under Washington law. RCW 43.52. It is an association of 19 Washington public utility districts and four Washington cities. Its role in financing facilities to generate power for distribution by nonmembers grew from the search by the federal Bonneville Power Administration and the region's utilities, through such planning groups as the Public Power Council and the Pacific Northwest Utilities Conference Committee, for ways to meet the region's expected future power needs by means other than the federal appropriations that built most of the large hydroelectric projects from the 1930s to the 1950s.

Under one such arrangement, WPPSS financed and owns the region's first major thermal generating plant, a nuclear reactor at Hanford, Washington, that was authorized by Congress in 1960 and completed in 1966. The projected output of the Hanford reactor was integrated into the Bonneville system by assuring participating utilities of firm power from BPA in return for their shares of the Hanford output, whether or not the Hanford project in fact produced any power. BPA promoted the construction of additional generating plants in various ways. One of these was the device of "net billing," by which utilities financing the plants would assign their share of the generating capacity to BPA in exchange for credits on hydroelectric power purchases from BPA. Because this arrangement assured that the utility would receive BPA power to the amount of payments so credited, BPA in effect assumed the risk that the generating capacity assigned to it would fall below expectations. This device was used for the Trojan nuclear power plant at Rainier, Oregon, and for three earlier WPPSS plants, Washington Nuclear Projects (WNP) 1, 2, and 3. BPA withdrew the "net billing" device for the two projects, WNP 4 and 5, that are involved in the present litigation. BPA nevertheless encouraged its "public power preference" customers to go forward with WNP 4 and 5, predicting a deficiency in

federally generated power for their needs, but BPA did not offer protection against the possible failure of these projects corresponding to the earlier arrangements.[1]

In order to finance projects WNP 4 and 5, WPPSS executed five sets of contracts. Those relevant to the present issues are the Participants' Agreements and a bond resolution for the sale of bonds to investors which is incorporated in the Participants' Agreements. There also is an agreement for assigning to WPPSS for resale any power that a participant might not use, an agreement for acquisition by Pacific Power and Light Company of a 10 percent undivided ownership share in project 5, and an agreement for short term sales of power to certain industries.

A number of the disputed issues depend on how the Participants' Agreements are characterized.

The agreements themselves are written as contracts for the sale of shares of "project capability," a phrase which in turn is defined to mean "amounts of electric power and energy, if any, which the Projects are capable of generating at any particular time." Under the terms of the Participants' Agreements, WPPSS undertook the financing, design, construction, operation, maintenance, and eventual termination of the power plants, to issue and service bonds for that purpose, and to deliver power from the plants to the federal transmission grid for the account of each participant. The participants, in turn, promised to pay proportionate shares of the costs of constructing, operating, and terminating the two projects, whether or not they received any power from them. Each agreement went into effect only when agreements allocating 100 percent of the projects' capability and costs were executed. An "Official Statement" issued by WPPSS in marketing its bonds summarized the agreement as follows:

> "Each Participant is obligated to pay the Supply System its share of the total annual cost of the Projects, including debt services on the Bonds . . . whether or not the Projects are operable or operating and notwithstanding the suspension, reduction or curtailment of the Projects' output."

Certain other provisions of the Participants' Agreements are important. Participants undertook to make payments only from electric utility revenues; in turn, each promised to maintain electric rates high enough to cover its payment to WPPSS along with its other obligations.[2] A participant's share could increase as much as 25 percent if another participant of the same type were to default. This step-up clause was designed to cover possible gaps in financing.[3] The agreements provide for election of a Participants' Committee with powers to review proposals of WPPSS on specified subjects and, in case of disapproval, to submit the matter to a Project Consultant.

By its Bond Resolution 890, WPPSS authorized issuance of revenue bonds to finance the construction of WNP 4 and 5. The resolution covenanted that WPPSS would collect revenues from charges for power, "including capability," sufficient to service the bonds and that it would not rescind or amend the participants' obligations or payments. Chemical Bank was named as the bond fund trustee and empowered to enforce the agreements. A provision of the Participants' Agreement, in turn, "recognized" that WPPSS was bound to comply with the Bond Resolution, among other regulatory and contractual obligations, and provided that "this Agreement is made . . . subject to the terms and provisions of . . . the Bond Resolution" and regulatory requirements.

In short, the transactions were designed so that WPPSS could raise the capital needed to build two nuclear power plants by assuring that 100 percent of the costs would be recovered through irrevocable contracts with distributing utilities, which agreed to maintain their own rates high enough to meet those costs but were not obliged to meet them from any other source of funds.

At the time of this litigation, WPPSS had terminated the projects after raising and spending several billion dollars toward their construction, when accumulating costs and marketability of power at the resulting prices proved vastly different from the initial assumptions. These events, however, do not bear on the issues before the court, apart from illustrating the risk that was present from the beginning.

The question whether the cities and PUDs had authority to enter the transaction will not be judged by hindsight. That question is important beyond this case and will remain important for the future ability of the cities and districts to serve their communities, unless their authority is changed by law. It will not be decided with a view to the fate of WPPSS projects and its consequences. The answer must be the same as if the project still promised to deliver power at reasonable cost, and the cities and PUDs were defending their participation against a challenge, for instance, by opponents of nuclear power seeking to attack the legal basis for the projects.

III. NONCOMPLIANCE WITH STATUTES

On two occasions, the Legislative Assembly responded to the concern of cities and PUDs by providing new statutes under which these public entities might join others in securing the thermal generating capacity that federal agencies could not provide. It enacted the Thermal Power Facilities Act (TPFA), or Laws 1967 ch 603, and the Joint Operating Agency Act, or Laws 1973 ch 722. The cities and PUDs did not use either of these statutes in their agreements to purchase "power capability."[4] The parties dispute whether failure to follow these statutes is fatal to the agreements, either because there is no other authority to participate in the kind of projects undertaken here, or because the specific statutory provisions displace whatever authority otherwise might exist.

The Thermal Power Facilities Act, codified with respect to cities in ORS 225.450 - 225.490 and with respect to PUDs in ORS 261.235 - 261.255, declared it to be in the public interest that cities, districts, electric cooperatives, and electric utility companies "participate as authorized in [the act]" to achieve economies of scale and to meet future power needs. ORS 225.460, ORS 261.240. The same sections direct that the act be "construed liberally" to effectuate those purposes. The act provides that "[i]n addition to the powers otherwise conferred" on cities and on districts respectively, each "may plan, finance,

construct, acquire, operate, own and maintain an undivided interest in common facilities" jointly with other utilities or any combination thereof, "and may make such plans and enter into such contracts and agreements as are necessary or appropriate for such joint planning, financing, construction, acquisition, ownership or maintenance." ORS 225.470, ORS 261.245. When proceeding under the act, each city or district "shall be liable only for its own acts," and no money contributed by it may be credited to another participant. ORS 225.480, ORS 261.250. Each may "furnish money and provide property" and sell revenue bonds "pledging revenues of its electric system and its interest or share of the revenues derived from the common facilities . . . in order to pay its respective share of the cost" thereof. ORS 225.490, ORS 261.255.

The opponents point to enactment of this statute to show that prior to 1967 the cities and PUDs lacked authority to join with others in combined transactions of the kind before us. The testimony they quote from the legislative history shows that some witnesses doubted that such authority existed, and legislators may have shared those doubts. But that cannot be used to show what the prior state of the law actually was. The views legislators have of existing law may shed light on a new enactment, but it is of no weight in interpreting a law enacted by their predecessors. Moreover, witnesses and legislators alike would know that legal doubts alone could prove fatal to successful participation in any financing plan, however lawful it actually might be. It is perfectly sensible to meet such doubts by providing the desired statutory authority, whatever the prior authority might cover. TPFA's use of parallel provisions for the cities and the districts further demonstrates that the purpose was to provide each with assured authorization "[i]n addition to the powers otherwise conferred," for these powers are not otherwise identical.

The 1967 act shows that the legislators wanted Oregon cities and PUDs to be able to join with others in planning, financing, building, operating, and owning common facilities, and that they wanted this authority to be "construed liberally."

ORS 225.460, ORS 261.240. The act also shows that they wanted each city and district to be liable only for its own share, and that if it needed to issue revenue bonds, this would require the normal procedures prescribed in the city charter, ORS 225.490, and the PUD statutes, ORS 261.255, 261.355. Except for these constraints, the language of the TPFA is the language of authorization, not of limitation. We do not read the stated public policy that the cities and districts "participate as authorized" in the act to mean "only as authorized" therein. We are not persuaded that the TPFA was meant to supersede other powers available to cities or PUDs.

The second statute, the Joint Operating Agency Act, enacted in 1973, is codified in ORS 262.005—262.115. It authorizes three or more Oregon cities or PUDs to form a "joint operating agency to plan, acquire, construct, own, operate and otherwise promote the development of utility properties in this state for the generation and transmission of electric power and energy," and to join with other entities for that purpose, and it authorizes such a joint operating agency to participate in joint ownership of thermal plants in accordance with the TPFA. ORS 262.015. Given the TPFA, this second act clearly is supplemental, not exclusive, authority. The only claim made for it is that, along with the TPFA, it represents a legislative "offer" of otherwise nonexistent "extramural" authority to the municipalities, an issue dealt with later in this opinion.

We conclude that if the cities and PUDs otherwise had authority to enter the agreements challenged in this litigation, enactment of the two statutes did not supersede that authority or restrict it, except for the policy against financing another participant's share that is expressed in ORS 225.480 and ORS 261.245.

IV. APPLICABLILITY OF BOND PROCEDURES

The opponents attack the Participants' Agreements for failing to comply with provisions in charters, statutes, and the constitution that impose procedural rules and substantive limits

on incurring public debts. Some of these rules relate specifically to the issuance of bonds.

If the PUDs or the cities themselves had issued revenue bonds, they would have had to obtain the approval of their respective voters, the PUDs by virtue of ORS 261.305(6), ORS 261.355 and ORS 261.375(1), the cities by virtue of charter provisions. Of course, the PUDs and cities did not issue bonds, WPPSS did. The opponents argue, however, that the obligations incurred in executing the Participants' Agreements were the equivalent of revenue bonds and therefore required voter approval. The argument is stated in several ways. The participants' payments to WPPSS retire a debt incurred by WPPSS on their behalf which they have the sole responsibility to repay; therefore the participants must "treat this bonded obligation as their own." Construction of the projects by WPPSS on the strength of the participants' unconditional obligations to pay the costs was a "scheme" or "artifice" designed to circumvent voting requirements and other legal constraints. WPPSS, the opponents say, is only a "conduit" between the participants and the bondholders.

These descriptions do not make entirely clear whether the argument is that the participants are the true debtors of the bondholders and the bonds issued by WPPSS are really their bonds, or rather that the Participants' Agreements, by "pledging" future power revenues to pay all costs incurred by WPPSS, themselves constitute "bonds" issued to WPPSS. The opponents do not claim that either statement is literally true. The participants did not incur direct debts to the holders of WPPSS bonds, though their unconditional promises to pay the total costs of WNP 4 and 5 were the only source from which WPPSS would pay those bonds. Likewise, the participants borrowed no money from WPPSS that they promised to return with interest; what they expected to get for their future payments was electric power, expressed as a share in the generating capability of the projects. But the opponents claim that in substance, if not in form, the transactions were the same as issues of revenue bonds by the PUDs and cities themselves.

To support their claim that the court should look through the legal form to the economic substance of the transaction, the opponents rely on *Martin v. Oregon Building Authority,* 276 Or 135, 544 P2d 126 (1976). That case arose upon special statutory review of the constitutionality of an act creating a building authority as a means to buy or construct buildings with revenue bond financing for lease to state agencies, and the court invalidated the act as an attempt to "create any debt or liability" exceeding $50,000 in a manner forbidden by Article XI, section 7, of the constitution. To show how the court reached that conclusion, we review the case in some detail.

The law at issue in *Martin* created the Oregon Building Authority as an "independent public body politic and corporate" for the purpose of developing "necessary facilities" for the state at an advantageous cost. The building authority's board of directors was composed of the State Treasurer, the Attorney General, and the Director of the Department of General Services. The building authority was empowered to finance the acquisition of buildings for lease or sale to state agencies by issuing notes and bonds which were to be payable solely from the building authority's revenues or other assets and expressly were not to be a "debt or liability of the state." Revenues obtained from leasing or selling buildings to the state would be pledged as security for payment of the bonds and channeled through a trust fund administered by an independent trustee. At the time of the litigation, the board of directors had adopted resolutions for the issuance of bonds to finance seven projects, including the construction of new wings for the capitol. Each was to be leased to the state under leases which fixed the rent at the amount of debt service on the bonds plus the building authority's operating expenses. The court found that the state's obligation to pay rent was unconditional and "supported by the state's full faith and credit." 276 Or at 138-139. The rentals were assigned to the trustee or trustees for the benefit of the bondholders.

Justice Holman's opinion for the court began by reviewing the origins of constitutional debt limitations in the 19th century

in response to excessive government borrowing, primarily for transportation facilities, which often led to defaults. The opinion then stated:

> "It is generally agreed that in imposing debt limitations, 'the predominant purpose was the achievement of a high degree of control over debt creation in order to forestall irresponsibly imposed tax burdens * * *.' The Oregon cases have stated that our provision 'was adopted by the people as a protection against burdensome and excessive taxation' and that it was intended 'to prevent exposing the sources of public revenue to potential hazard.' Long-term obligations create a fixed charge against future revenues and can impair the flexibility of planning and the ability of future legislatures to avoid a tax increase. Debt restrictions force the elected representatives of the people to operate the government within its means and remove the temptation to undertake projects on an enjoy-now, pay-later basis."

276 Or at 141 (footnotes omitted). The opinion observed that building authorities were a controversial device to skirt debt limitations, though they had been upheld in a majority of cases in other states. To sustain the Oregon Building Authority would depend on finding that neither the authority's bonds nor the state's leases were debts within the constitutional prohibition.

The court noted that the bonds might escape the prohibition if the issuer were truly independent of the state, or if they were revenue bonds even if the issuer was considered a state agency. The revenue which was pledged to support these bonds, however, was future government rents payable from funds raised by taxation. As to independence from the state, the court thought the status of the building authority comparable to that of the university regents in *McClain v. Regents of the University,* 124 Or 629, 265 P 412 (1928), whose dormitory construction bonds had escaped the debt limitation only because they were revenue bonds. The building authority, the court noted, "is managed and controlled by state officers, it must report periodically to the Governor and must obtain

legislative approval for certain of its actions, and it is maintained largely by public funds. Its sole purpose is to implement the building policies of the state." The main difference from the university regents was the legislature's description of the authority as an "independent body." 276 Or at 144.

The court concluded that when the transactions were viewed as a whole, the separate existence of the building authority must be disregarded. It reached this conclusion in essence because the building authority had no purpose other than to borrow money, because its income was assigned to trustees, because the state was its only possible tenant, because the authority had no other use for the structures it financed, and because the leases delegated responsibility for handling construction of the authority's projects to the state. 276 Or at 144-145, 147.[5] The court therefore described the building authority as a "gutless intermediary" whose sole function was to insulate the actual relationship between the bondholders and the state from the constitutional debt limitation, and it summarized its holding to be "that for constitutional purposes we are going to look through the dummy corporation and that the bonds are the debts of the state." 276 Or at 145, 147.

Although the issue presently under discussion is not debt limitation but voting requirements, the opponents of the Participants' Agreements argue that the similarities of the financing arrangements in this case to those in *Martin* equally require us to disregard the separate existence of WPPSS and to treat the bonds issued by WPPSS as the participants' bonds. The economic similarities are great. In both cases, unconditional commitments of governmental customers to pay for future services were used by bond issuers to finance facilities for the exclusive benefit of those customers; the amount of future payments was tied to the costs of financing the projects; and those payments were the only source of repayment for financing the acquisition, construction, and operation of the projects. In both cases, also, the transactions were designed to avoid borrowing by the governmental users by having a supplier rather than the user borrow the needed funds on the strength of

long-term user agreements covering the entire cost of the projects.

The differences between the Oregon Building Authority and WPPSS are equally obvious. The building authority was created by the state government solely as an instrumentality to finance its own need for buildings. It was directed by a board composed of the chief legal, financial and property management officials of the state government. Whatever the building authority act meant by the phrase "independent public body politic and corporate," such a board could no more be a "body politic" divorced from state government than, for instance, the State Land Board composed of the Governor, Treasurer and Secretary of State.[6] WPPSS is not a creation of the Oregon participants in WNP 4 and 5, or of all the 88 participants in those projects; as stated above, it was organized under Washington law in 1957 as a statutory municipal corporation and joint operating agency of 19 Washington public utility districts and three Washington cities. WPPSS is not "managed and controlled" by officers of the government with which it contracted, as the *Martin* court observed of the building authority. Moreover, WPPSS did not, like the building authority, delegate to the user agencies the responsibility for construction of the projects it would finance for them.

Again, it must be remembered that the present discussion does not concern the question whether the Oregon participants incurred "debts," but whether the participants are the actual—and unauthorized—issuers of the bonds sold to finance WNP 4 and 5 because the separate existence and role of WPPSS should be disregarded like that of the building authority in *Martin.* On this question the economic similarity of the financing devices is not decisive. The commitment of an agency's long-term contract as security, even as the sole security, for financing a building, a power plant, or another source of supply dedicated to the agency's use does not turn WPPSS or any otherwise independent supplier into a "dummy corporation" of the contracting agency. WPPSS was used as the vehicle for building thermal generating projects for the partici-

pants precisely because it already had an independent existence and bonding capacity. The *Martin* decision does not support a holding that would disregard this independent existence of WPPSS as the issuer of its bonds.

V. DEBT LIMITATIONS

The Participants Agreements obligate each participant to make its contractual payments to WPPSS whether or not the projects are completed and whether or not they produce electric power. These payments, however, are to be made only from the participant's revenues derived from the operation of its electric utility properties.[7] The parties dispute whether the obligations are debts or indebtedness, as those terms are used in the various laws applicable to such debts, or escape these laws because they are payable only from electric power revenues. The arguments concerning the cities differ from those concerning the PUDs and we deal with each separately.

The issue whether the cities' unconditional commitments to WPPSS constitute debts arises under the individual city charters. When cities were incorporated by individual legislative acts, Article XI, section 5 of the Oregon Constitution required such acts incorporating cities to "restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit." One city, Springfield, still has a statutory charter; the others adopted their own charters after Article XI, section 2, shifted that function from the legislature to the cities themselves.[8] Each has a debt limitation in its charter, but they are not identical.[9]

It should be understood that the meaning of a charter debt limitation, as the meaning of any other charter provision, is an individual matter for each city. The adoption of a debt limitation, by charter or otherwise, is local legislation, to be interpreted by the same means as other legislation, including attention to the meaning intended by those who adopted it if that can be ascertained. It is not a matter of common law, to be resolved by consulting caselaw or encyclopedic summaries of

caselaw. *Cf. Anderson v. Peden,* 284 Or 313, 315-316, 587 P2d 59 (1978) (concerning the meaning of "conditional use" in zoning ordinances). A city can write its charter or ordinance to define for itself the amount, character, or purposes of indebtedness that it means to limit. Not only can cities choose different words; legislative history may show that cities, like state legislatures, meant different things by the same words.

It therefore is not conclusive that cases have held indebtedness under various charter provisions to include long-term contracts or to exclude obligations payable from "special funds." In the absence of statute, a city can design its debt limitation to exclude payments due for goods and services as distinct from borrowed money, or to include debts payable from non-tax revenues.[10] Under the "home rule" powers of Article XI, section 2 of the Oregon Constitution, these are political choices for the cities; they will not be imposed by courts in the name of judicial doctrines.

This does not mean that past judicial opinions are irrelevant in interpreting a particular provision. Given the ingrained tendency to copy conventional texts, though obscure, rather than seek clarity by new ones, charter debt limitations may well have been adopted and later repeated in the belief that they meant whatever courts or McQuillin had said of such provisions generally.[11] As early as 1873, for instance, this court held that a 17-year contract to purchase water at a fixed rate created an immediate indebtedness for the total, aggregate purchase price. *Salem Water Co. v. City of Salem,* 5 Or 29 (1873), *see also Brewster v. Deschutes County,* 137 Or 100, 1 P2d 607 (1931). The assumption that present charter provisions accept that interpretation of indebtedness might be overcome by showing a different intention, but no such showing has been attempted in this case. WPPSS invites us to reconsider this "aggregation rule," citing a reference to that possibility in *Terry v. Multnomah County,* 279 Or 127, 136, 138, 566 P2d 878 (1977). But, as already stated, that view of long-term contracts is not properly a judicial rule but judicial interpretation of state or local laws, and it can be modified at will by amending the laws.

For present purposes we accept the opponents' assertion that the cities' financial commitments to WPPSS would qualify as indebtedness within these cities' respective charters if they were payable from general funds. The question is whether the charter limitations exclude debts payable only from electric utility revenues under the interpretation of debt limitations generally known as the "special fund doctrine."

We note that this "doctrine," too, is not a judicial rule of law but judicial interpretation of provisions found in various statutes, charters, and the constitution. Again, however, it is an interpretation that early was recognized in Oregon, *see, e.g., Brockway v. Roseburg,* 46 Or 77, 79 P 335 (1905), *Eaton v. Mimnaugh,* 43 Or 465, 73 P 754 (1903), *Avery v. Job,* 25 Or 512, 36 P 293 (1894), and we are offered no evidence that any of the provisions relied upon in this case were differently intended or in practice have been thought to include debts payable from non-tax revenues.

The proponents rely on this court's statements of the doctrine in *Butler v. City of Ashland,* 113 Or 174, 232 P 655 (1925), which involved a city's contract to buy water from an irrigation district. The city expected to pay for the water by issuing notes exceeding the amount of debt allowed by its charter, and the contract originally was made contingent on approval of a charter amendment by the voters. When the city found that it could meet the cost from accumulated and expected revenues from the sale of water, the contract was changed to substitute "certificates of indebtedness" payable exclusively from those revenues, and no authorizing election was held. The court declined to enjoin issuance of the certificates of indebtedness as a violation of the charter. It wrote:

> "The authorities are well-nigh unanimous, that where a contract creating an indebtedness provides for a special fund with which to meet the indebtedness as the same accrues, and no general liability is thereby created against the municipality, such an indebtedness is not within the

constitutional inhibition against creating a debt in excess of a fixed amount . . . ."[12]

"The language of the special obligation note limits the liability of the city to the water revenues. The special obligation notes, therefore, do not constitute an indebtedness against the city within the meaning of Article XI, Section 5, of the Constitution of Oregon."

113 Or at 182-183.

Subsequent decisions have repeated this view of debt limitations, making their application turn on the potential exposure of general tax revenues. *Compare, e.g., Walsh Const. Co. v. Smith,* 272 Or 398, 404, 537 P2d 542 (1975) (housing bonds payable from rents held to be outside debt limitation despite a "moral make-up clause"); *Morris v. City of Salem,* 179 Or 666, 174 P2d 192 (1946) (same for contract to purchase parking meters payable only from meter revenues), *McClain v. Regents of the University, supra,* (same for dormitory bonds payable only from rental income), with *Public Market Co. v. City of Portland,* 171 Or 522, 130 P2d 624, 138 P2d 916 (1943) (lack of revenue source to repay "utility certificates" would violate debt limitation), *Rorick v. Dalles City,* 140 Or 342, 12 P2d 762 (1932) (held to be within the debt limitation because of partial exposure of general funds beyond tolls collected from toll bridge).

We repeat that the exposure of tax revenues is not an inescapable definition of indebtedness. A public entity's financial obligations payable from its operating assets, like those in *Butler* or in the other cases cited above, may have all the ordinary characteristics of debt of a private entity engaged in a similar operation, and charters or other laws may choose how such debt should be incurred or restricted. The uniform interpretation given existing laws, however, is of long standing. The cities and their ratepayers do not claim that the special fund doctrine, as previously understood in Oregon, does not apply to their respective cities, but they claim that it does not apply to the obligations imposed by the Participants' Agreements.

They seek to distinguish the decisions applying the doctrine by arguing that none of those decisions involved obligations with all the features of the present agreements. They observe that the cities' financial obligations towards WPPSS are not for projects owned or controlled by the cities, do not depend on actual receipt of any benefit (in this case electricity), are not self-liquidating, are not finite in amount or in the rates committed to paying them, and obligate revenues that are paid by substantially all residents for an essential service. They maintain that these characteristics should take the contracts beyond the limits of the "special fund" exception. The proponents respond that characteristics which individually do not create a debt under the charters also cannot cumulate so as to create a debt.

None of the listed characteristics places a transaction outside the "special fund" rule. This court's older decisions did not confine that concept to self-liquidating projects but used the term also to refer to assessments levied for specific projects that generated no revenue, such as a courthouse, *Dougan Co. v. Klamath County,* 99 Or 436, 193 P 645 (1920), a jail, *Wingate v. Clatsop County,* 71 Or 94, 142 P 561 (1914), and roads and streets, *Morris v. City of Sheridan,* 86 Or 224, 167 P 593 (1917), *Bowers v. Neil,* 64 Or 104, 128 P 433 (1912), *Kadderly v. Portland,* 44 Or 118, 74 P 710, 75 P 222 (1903), *Little v. City of Portland,* 26 Or 235, 246, 37 P 911 (1894). Also, the persons who provide the "special fund" need not be direct beneficiaries of the expenditure; indeed, there need not be any quid pro quo. In *Moses v. Meier,* 148 Or 185, 35 P2d 981 (1934), the court applied the doctrine to an unemployment relief fund payable from liquor control revenues. The opponents observe that *Moses v. Meier* was litigated as a "friendly" proceeding and perhaps turned on the court's desire to uphold the laudable purpose for which the liquor control funds were exacted in the first place. Nonetheless, the source of the funds, not the purpose to which they were put, explains the decision that they escaped the constitutional restriction on state debt.

Against the position emerging from these cases, opponents argue forcefully that a debt limitation confined to commitments

of tax revenues cannot prevent state or local officials from entering speculative or ill-considered undertakings without the prior consent of their constituents. That is true; in hindsight, the present contracts are an example. The law of debt limitations in general and the special fund doctrine in particular have had their share of criticism; upon a fresh start in the light of experience one might draw the lines differently. But the argument presents a task for lawmakers; it comes too late for judges. As recently as 1976, Justice Holman's opinion in *Martin v. Oregon Building Authority, supra,* reiterated that the predominant purpose of debt limitations was to forestall irresponsibly imposed tax burdens, to protect against "burdensome and excessive taxation," *McClain v. Regents of the University,* 124 Or at 634, to "prevent exposing the sources of public revenue to potential hazard," *Carruthers v. Port of Astoria,* 249 Or 329, 337, 438 P2d 725 (1968),[13] and to preserve "the ability of future legislatures to avoid a tax increase." 276 Or at 135. Too many commitments have been made on that understanding to overturn it now, in the absence of a showing that a particular law or charter provision meant something else. And the interpretation of debt limitations as referring to commitments of tax revenues is defensible. It is not unreasonable to suppose that a community might wish to impose quantitative or procedural restraints on the perennial political urge to spend the next generation's taxes, yet not wish to extend the same restraints to the management of its public service enterprises as long as tax revenues are not obligated.

We do not accept the opponents' argument that utility rates in fact are equivalent to taxes because they have a comparable economic impact on ratepayers. Any charge for a public service reduces the user's disposable funds much as taxes do; that was true of the water charges in *Butler,* the dormitory rents in *McClain,* the bridge tolls in *Rorick,* and the parking meters in *Morris,* each of which was a necessity for some class of users. Charges for these necessities are not inescapable in the same sense as taxes are. This is what makes general obligation debt preferable to creditors, and correspondingly cheaper. At some point it may become too expensive to drive or park a car,

to attend a college, to water a lawn; and it also is possible to reduce one's consumption of elecricity, to substitute another fuel, or in the case of a plant or institution, perhaps even to generate one's own electricity. If an unforeseen event prices too many users out of the market for the service, the creditor also loses the only source of repayment. In equating a commitment of future rates, expensive as it may prove to be, to a pledge of future taxes, the opponents simply attack the "special fund" premise of this long-established line of decisions in another way.

Nor, finally, do we agree with the contention that the Participants' Agreements in fact expose the cities to general liability. The agreements plainly were intended to exclude any obligation that would bring them within the various debt limitations. That was understood to be essential to their validity, and they must be interpreted accordingly. *Public Market Co. v. Portland,* 171 Or at 565. The agreements expressly negate any obligation to pay except from the revenues derived from the ownership and operation of a participant's electric utility properties. The exclusion of any broader liability deserves to be taken at face value. *See Carruthers v. Port of Astoria, supra,* 249 Or at 339-340.

VI. PROHIBITION OF "STOCKHOLDING" OR "LOANING CREDIT"

The preceding sections have discussed bonding procedures and debt limitations that could be satisfied, if necessary, by putting the intended commitment to the WPPSS projects to a vote of the respective participants' voters. Beyond those issues, the opponents also invoke constitutional limitations which could not be so satisfied but would prevent the cities and districts from entering into these transactions altogether.

Article XI, section 9 of the Oregon Constitution provides:

> "No county, city, town or other municipal corporation, by vote of its citizens, or otherwise, shall become a stockholder in any joint company, corporation or associ-

> ation, whatever, or raise money for, or loan its credit to, or in aid of, any such company, corporation or association . . . ."[14]

The opponents contend that the participants became "stockholders" in WPPSS and in WNP 4 and 5, that they "raised money" for WPPSS and the projects, that they "loaned their credit" to WPPSS as the security for its bonds, and that, however characterized, the effect of the financing scheme was to create the kind of risks that the constitutional provision was designed to prevent. The proponents respond that WPPSS has no "stock," that the constitutional clause only applies to funds invested in or raised for private enterprises, and that, again, it applies only to the use of general tax revenues. Each side relies on passages from past opinions discussing the scope of Article XI, section 9. The proponents quote statements that the clause is directed at using public funds in aid of private corporations, as said in *Carruthers v. Port of Astoria, supra,* 249 Or at 340, and *Johnson v. School District No. 1,* 128 Or 9, 12, 270 Or 764, 273 P 386 (1929). *See also Sprague v. Straub,* 252 Or 507, 511-518, 451 P2d 49 (1969) (discussing parallel prohibition of article XI, section 6). The opponents quote from the same opinions statements that the targets of the section were "speculation" (*Johnson*) and a "potential hazard" to public revenues, *Carruthers v. Port of Astoria, supra,* at 329.

These statements, of course, are not inconsistent. No doubt those who drafted the prohibitions had in mind the practice of aiding private enterprise, and the quoted statements were made in that context; the cases did not have to consider speculative investments in securities of enterprises that might not be "private."

The opponents make a good textual argument for the position that the word "corporation," as used in Article XI, was not confined to today's business corporation but included public as well as private corporate entities, and that the phrase "any joint company, corporation or association, whatever" in section nine encompasses an entity such as WPPSS.[15] We also may

assume for this argument that the term "stockholder" does not allow evasion by substituting another word to describe a financial investment in such an entity that is neither repayable as a debt nor part ownership of identifiable property. The hypothesis distinguishes the transactions sustained in *Churchill v. Grants Pass,* 70 Or 283, 141 P 164 (1914) (agreement to build a railroad for lease or sale to private company), and *Security Co. v. Baker,* 39 Or 396, 65 P 369 (1901) (common ownership of real property with private company). Even on these assumptions, the Participants' Agreement did not make the participants "stockholders" in WPPSS, a statutory entity composed of Washington cities and public utility districts. Nor are we persuaded that the 88 participants themselves formed an "association" in which they held "stock" within the meaning of Article XI, section 9.

Equally unconvincing is the argument that the participants "raised money" for WPPSS; if anything, WPPSS, by selling its revenue bonds, raised money intended to benefit the participants. Of the several prohibitions combined in Article XI, section 9 of the Oregon Constitution, the opponents' most plausible claim is that WPPSS was able to sell its bonds only on the strength of the participants' "loan" of "credit" in the form of their unconditional promises to pay the bills.

Past opinions discussing these constitutional provisions include some cases in which the government became a co-owner of property or borrowed funds to aid a private enterprise in a desired economic development. *See Miles v. City of Eugene,* 252 Or 528, 451 P2d 59 (1969) (joint construction of power plant); *Carruthers v. Port of Astoria, supra* (municipal financing of aluminum reduction plant for long-term lease to specified private company); *Hunter v. Roseburg,* 80 Or 588, 156 P 267, 157 P 1065 (1916) (municipal bonds for joint railroad project with railroad company and lumber company). These more properly illustrate "raising money" than "lending credit." By forbidding the state to "lend" and local governments to "loan" their credit, as well as to hold stock in or raise money for a corporation, Article XI covers transactions in which govern-

ment does not itself raise and transfer funds but places its credit behind the corporation's ability to borrow money or obtain goods on credit. The obvious example is an outright guarantee made directly to a creditor to pay another's debt. Although the Participants' Agreements with WPPSS are not literally guarantees to the bondholders, the opponents argue that they are the functional equivalent and should be treated as such.

Indisputably WPPSS undertook and was able to sell bonds and begin construction on the strength of the participants' commitments to pay the bills sent by WPPSS as they came due. The transactions were built around those commitments. That might be true of any private project undertaken to satisfy a specific governmental demand and financed on the basis of a long-term lease or contract, at a price tied to the supplier's costs. What makes these agreements into a loan of credit rather than a purchase contract, according to the opponents, is that the participants assumed the "dry hole" risk in section 6(c), *supra* n. 2, which committed them unconditionally to pay all that WPPSS would borrow and spend without assurance of receiving anything in return.

Although this seems to state a plausible distinction between a cost-based purchase contract and a loan of credit, on examination it proves to be doubtful. The argument implies that the agreements would be valid as long as they were contingent upon the delivery of some electricity to the participants, at whatever cost. It is not obvious why the legal character of the transaction should differ if the power plants were completed at great cost but produced only a small fraction of the expected electricity rather than none. In either event WPPSS would have obtained the necessary funds upon the assurance of the participants' obligations to pay.

But we need not decide whether an unconditional agreement to pay the costs of a speculative source of supply ("project capability") would constitutionally differ from an agreement to buy an unspecified quantity of electric power priced at equally speculative costs, if the agreement involved a general obligation to pay from public funds. This court's past interpretation of

Article XI, section 9, as of the other debt limitations, once again has confined the prohibition against loans of credit to those which expose the government's general credit, that is to say, its taxing power. Thus *Miles v. City of Eugene,* 252 Or at 531, cited *McLain, Moses,* and *Carruthers* for the proposition that the "loan of credit" clause "is not a restriction upon the obtaining of funds by a municipality by the sale of revenue bonds, as distinguished from general obligation bonds." The court explained *Carruthers v. Port of Astoria, supra,* as follows:

> "In that case the Port proposed to raise funds by the sale of revenue bonds. With the funds the Port was going to build an aluminum reduction plant, lease it to a private company, and grant the private company an option to purchase the plant at the end of 25 years for a nominal balance. We held that this did not amount to raising money for a private business or loaning credit to, or in aid of, the private company. Likewise, the proposal in this case would not come within the constitutional prohibition against raising money or loaning credit. Money coming from revenue bonds and not from tax money does not fall within the prohibition."

252 Or at 533-534. And the *Miles* opinion concluded, at 537:

> "In this case and in *Carruthers v. Port of Astoria,* supra (438 P2d 725), the parties attacking the constitutionality of the proposals relied strongly upon *Hunter v. Roseburg,* 80 Or 588, 156 P 267, 157 P 1065 (1916). That case is distinguishable because in that case the city was proposing to finance the construction of a railroad with general obligation bonds payable from general tax levies."

It may well be that the ban on stockholding, raising money for, or lending credit to corporations aimed to bar favoritism, corruption or other misuse of political institutions to aid particular private enterprises as well as to protect public finances against speculation. Private use of government credit is not the issue in financial transactions among governmental entities like the cities, the districts, and WPPSS. And even if the aim to

protect public finances should cover speculative commitments to enterprises whose "private" or "public" character may be doubtful, the foregoing cases have defined the protected funds to be only tax revenues.

When government engages in public services or activities that generate revenues other than taxes, this court's past decisions have let government commit those revenues to financing its own projects or to support desired private projects, though of course it remains in the power of state and local lawmakers to provide otherwise. These judicial decisions often were obtained before the actual execution of financing schemes that the communities concerned deemed desirable, as in *Miles* and *Carruthers, supra.* The law there pronounced cannot be disregarded or overturned because a set of commitments made in reliance thereon has come to grief.

VII. CITY AUTHORITY

The ratepayers and four municipalities, Bandon, Cascade Locks, Drain, and the Canby Utility Board, contend that the cities had no authority by charter or by statute to enter into the Participants' Agreements. The cities of Springfield, McMinnville and Milton-Freewater, along with WPPSS, defend their authority to do so. The trial court held as a conclusion of law that "Municipal Participants do not have charter authority, either express or implied, to enter into the Participant's Agreement." More specifically, the court concluded that the agreements were a "guaranty" and a "pledge of systems revenues" to secure the obligations of WPPSS, and it held the agreements ultra vires because "Municipal Participants do not have statutory or charter authority to enter into such guaranty, security relationship or pledge, nor do they have statutory or charter authority to exercise extramural powers."

As stated earlier, it is inaccurate to treat the law of the cities' charter powers collectively rather than individually. To paraphrase what we said of debt limitations, the definition of charter powers is an individual matter for each city, a form of

local legislation to be interpreted by the same means as any other legislation, including attention to the intent and purpose of those who adopted it. The briefs devote much space and attention to quotations from past opinions, which in turn quoted treatises quoting case law, on "strict" or "liberal" construction of charter powers. But such supposed judical "rules of construction," though fairly quoted, are of limited utility in interpreting a particular city charter.

Again, charter authority "is not a matter of common law, to be resolved by consulting case law or encyclopedic summaries of case law." *Supra,* pp. 24-25. Adoption of a charter is a political act of a particular community at a particular time. A court's decision that one city did not have authority to undertake a project does not decide whether another city has such authority, or the same city at another time. A city can write or amend its charter or ordinance to define for itself what functions and services it wants its agencies to perform, consistent with statutes and the constitution. Within those constraints, a city may empower its government to operate utilities, including the distribution or the generation of electricity, or it may deny or limit that power. An earlier case involving the sale of electric power by one of the present parties, for instance, hinged on a provision of the McMinnville city charter that allowed it to sell such power to citizens of the city "and vicinity." *Yamhill Elec. Co. v. City of McMinnville,* 130 Or 309, 274 P 118, 280 P 504 (1929). A charter also may specify whether it means to authorize only acts expressly mentioned, or others implied in order to achieve wider objectives, or perhaps specify different principles depending upon the function. In fact, the charters of several cities in this case contain directives that they be "liberally construed." To repeat, under home rule these are political choices for the cities; they will not be imposed by courts in the name of judicial doctrines. The court can only try to determine what political choice is expressed or implied in the charter or other source of authority.

Each of the cities here has charter provisions pertinent to the purchase of electricity. The Canby, McMinnville, and

Springfield charters create separate utility boards or commissions. In the case of the Springfield Utility Board, whose authority is disputed by the Springfield ratepayers, the charter authorizes the board to act for the city "in connection with all matters relating to the management, operation, acquisition, and financing of all electric . . . properties now owned or hereafter acquired by the city of Springfield." The "properties" referred to may be either generating or distributing facilities. It is unnecessary to construe the "properties" as including electricity, because actions taken to secure a future supply of electric power plainly relate to the management and operation of a distributing system.

Some of the other cities may have undertaken to distribute electricity under older terminology authorizing them to provide street lighting or "furnishing their inhabitants with gas or other lights," or under more general authority to provide services for their citizens. Their authority to provide electric utility service has long gone unchallenged and is not challenged here. The opponents do not put in issue any of the cities' authority to provide electric service and to obtain the necessary electric power from others. Understandably, none of the cities themselves nor the ratepayers argue that any of the respective charters do not permit the city to operate an electric utility system, to acquire electric power from distant suppliers, or to secure such supplies by long term contracts. They deny only that the authority to contract for future supplies of power extends so far as to enter into the Participants' Agreements used in this instance.

One of the arguments made by the opponents and accepted by the circuit court is that the agreements involve an "extramural" exercise of municipal power for which cities need authority from the state as well as from their own charters. They cite cases of an earlier generation that recited this rule in general terms, although the decisions rarely invalidated the particular activity in issue. *See, e.g., City of Salem v. O.W. Water Serv. Co.,* 144 Or 93, 23 P2d 539 (1933) (sale of city water outside the city authorized by law and charter); *Yamhill*

Elec. Co. v. City of McMinnville, supra, 130 Or 309, 274 P 118 (1929) (same for sale of electricity); *State v. Port of Astoria,* 79 Or 1, 154 P 399 (1916) (sustaining legislation for operations of port). *Richards v. City of Portland,* 121 Or 340, 255 P 326 (1927), denied the city's power to sell water beyond its boundaries, but that was in defense against a claim of nonresident plaintiffs that the city was bound to sell them water, and in *Yamhill Elec. Co. v. City of McMinnville, supra,* two years later the court said that "all expressions in the opinion in that case must be construed with reference to the issue there being tried." 130 Or at 340.

A broad generalization that a city has no "power" or "authority" beyond its borders does little to explain what constitutes an exercise of "power" or "authority." It does not explain, for instance, why these terms apply to a city's sales of goods or services outside its borders more than to its purchases. Nor is it always clear whose interests the rule is meant to protect, that of the citizens who have authorized the city's action or that of the surrounding governmental entities and their inhabitants. Possibly the early opinions reflect concern about competitive encroachments by municipal enterprises or private business more than legal analysis. *See, e.g., Yamhill Elec. Co., supra.* Perhaps also the installation of permanent city facilities, even if accomplished by ordinary "proprietary" transactions, may sometimes represent an extension of the city's presence beyond its borders that should be authorized by the state rather than only the city's own citizens. *See, e.g., Riggs v. Grants Pass,* 66 Or 266, 134 P 776 (1913). Primarily, however, the concept of "extramural power," power "outside the walls," is relevant when a city undertakes to assert coercive authority over persons or property outside its boundaries. It has little relevance to a city's contracts or other consensual transactions in goods or services, although an exercise of eminent domain outside city limits, for instance, would be an exercise of extramural power.

The opponents attack as "extramural authority" the provisions of the agreement that afford the participants certain

privileges in supervising the construction and operation of the projects by means of a Participants' Committee. Without setting out these provisions here, we agree that they would be a significant exercise of authority if a city attempted to impose them upon any enterprise not its own. In such a case the location of the projects outside the city could be significant. But the cities did not impose these provisions on WPPSS as an exercise of municipal power. Rather, their inclusion in the agreement between WPPSS and the participants clearly was a safeguard designed to give the participants a means to protect their interests in the success and the cost of the new source of power that WPPSS was contracting to provide for them. If the agreements survive the other attacks made upon them, the cities needed no additional authorization to share this protective function merely because the projects would be built outside their boundaries.

The circuit court also concluded that the agreements constituted an unauthorized "guarantee" of debts incurred by WPPSS, which were "secured" by a "pledge" of the municipal utility systems' revenues. We do not agree.

In Part VI above, we discussed essentially the same characterization of the agreement in rejecting the contention that the agreements were a forbidden "loan of credit" to WPPSS. There we noted that any long-term contract to buy a supplier's unspecified output at a price tied to the supplier's cost might serve as the economic basis for financing the supplier's purchase or construction of the requisite facility, and that the opponents distinguished the present agreement from such a contract only because the participants unconditionally obligated themselves to pay their share of those costs even if WPPSS was unable to deliver any power in return. We were not persuaded that the legal character of the transaction (as a purchase contract or a "loan of credit") should differ if the power plants were completed at great cost but produced only a small fraction of the expected electricity rather than none.

A legal distinction between a little electricity and none is even less apparent when the issue is charter authority, because

here we deal with grants of power to responsible city officials rather than the meaning of a limiting term such as "loan of credit." If a city may commit itself to purchase at cost whatever a supplier using its best efforts can produce from facilities which will be financed in reliance on the city's contract, however small the production and however expensive the product turns out to be, then we see no reason why this authority stops at contracting to pay the costs if small and costly deliveries should turn out to be none at all.

These agreements proved unwise in retrospect, and with the benefit of hindsight they may appear to have been unwise when made. But that is no reason to find them unauthorized. When a city has authority to provide electric power or other public services, that authority cannot well be construed to permit wise but to exclude unwise contracts. A long-term commitment to pay the cost of a needed source of supply could prove to be a financial calamity in many imaginable situations. A city might contract to assure itself of a supply of oil in a period of shortages and high prices only to have the market price collapse in a subsequent oil glut. (Conversely, if McMinnville in the *Yamhil Electric Co.* case, *supra,* had made a firm contract to sell power it considered surplus, it later might have found itself having to pay far higher market price to replace it.) A city college might enter a long-term lease in order to have an apartment building converted to a dormitory for which there turns out to be no student demand. A desert city in need of a water supply might contract with some other entity to cover the costs of drilling wells in search of such a supply irrespective how little water was found. In the first example the price is excessive, the second acquisition proves superfluous, and the third may produce nothing in return for the money, but with respect to the issue of the cities' authority they are the same in principle. What distinguishes the present case is only the magnitude of the sums involved.

A separate question remains whether the cities gave an unauthorized guarantee of the obligations, not of WPPSS, but of their fellow participants, when their unconditional obligation

to pay regardless of deliveries is coupled with their agreement to pick up the shares of defaulting participants up to 25 percent of each participant's original share. We return to that question below.

VIII. THE PEOPLE'S UTILITY DISTRICTS.

Like the cities, the people's utility districts claim that they acted ultra vires, that is to say, exceeded their authority, in entering the Participants' Agreements. Of course, the PUDs' authority does not depend on individual charters, and there can be no question of their broad authority to enter into transactions appropriate to the operations of an electric utility; that is their function. Rather, the PUD's contentions, like the cities', also turn on characterizing the agreements as assuming debts or guarantees and not as power purchases.

The law governing PUDs is found both in the constitution and in statutes. Article XI, section 12, of the Oregon Constitution, adopted by means of an initiative in 1930, specified certain purposes and powers of such districts and directed the Legislative Assembly to provide any necessary legislation to carry out the provisions of the constitutional amendment.[16] That legislation is found in ORS chapter 261.

The constitution includes among the authorized purposes "the development of water power and/or electric energy" as well as its distribution and sale. It empowers the districts to levy property taxes, to issue, sell and assume bonds or other debt, to make contracts, to acquire property necessary or incident to the PUDs business, and to acquire, develop, or otherwise provide for electric energy for distribution both within and outside their territories. These powers are spelled out in greater detail in ORS 261.305—261.390.

As discussed in Part III of this opinion, additional provisions enacted in 1967 address the participation of PUDs in jointly owned power generating facilities. ORS 261.235—261.255. A district also may join in the formation of

a "joint operating agency" for the generation and transmission of electric energy under ORS chapter 262. The districts did not use the procedures of these statutes in entering their agreements with WPPSS.

The crux of the PUDs' claim that their participation was ultra vires is that the Participants' Agreements created a form of debt that a PUD may incur only after obtaining approval of its qualified voters. ORS 261.305(6) requires such a vote for issuing revenue or general obligation bonds by procedures further specified in ORS 261.355—261.375.[17] WPPSS responds that the PUDs did not issue bonds but only entered into a long-term contract to buy a share of whatever power WNP 4 and WNP 5 might be capable of delivering, at a price based on the cost of that capability.

The PUDs concede that they did not issue bonds; WPPSS did. They argue, however, that the Participants' Agreements shared such essential characteristics of revenue bonds that they were "identical in substance" to issuing such bonds. The characteristics referred to are that the PUDs obligated themselves to pay a proportionate share of all costs of the projects, including debt service and termination costs, that they would set their own rates high enough to produce the needed revenue, and that the obligation was unconditional, whether or not the projects produced any power or WPPSS breached the agreements. Because the same obligations are typical of revenue bond financing by the PUDs themselves, and because WPPSS offered its prospective bondholders no source of repayment other than these contractual obligations of the participants, the PUDs describe WPPSS and its bonds as a mere "conduit" for financing the projects with revenues "pledged" by the participants, relying essentially on the precedent of *Martin v. Oregon Building Authority,* 276 Or 135, 554 P2d 126 (1976).

We have reviewed and rejected that analysis in Part IV, above. But the PUDs also point to the sentence in ORS 261.305(6), *supra,* that allows the directors to borrow from banks and financial institutions "on notes payable within 12 months" no more than the district's estimated net income for

the 12 months following the "borrowing." The PUDs contend that this sentence limits their authority to "incur indebtedness" toward other than "banks or financial institutions," if it is not to have a loophole fatal to the apparent legislative purpose. They argue that if the restriction of ORS 261.305(6) applied only to banks or financial institutions, nothing would limit a PUD's authority to "borrow from General Motors, the Fred Meyer Trust, an Arab sheik or any other person with money to loan."

We may agree with the argument that the statutory limitation might apply to borrowing from any lender, whether or not it is primarily a bank or "financial institution" in the ordinary usage of those terms. But we need not decide this here, because we do not find any borrowing by the PUDs in this case.

The PUDs' brief quotes passages from *Fullerton v. Central Lincoln Utility Dist.*, 185 Or 28, 201 P2d 524 (1948), to the effect that the purpose of limiting the amount of borrowing without prior approval of the voters was "to require the directors to conduct the affairs of the district upon a pay-as-you-go basis," to require them "to carry on their corporate operations upon a cash basis," and "to put a brake upon the runaway enthusiasm of the directors." 185 Or at 36-37, 44. The first two passages actually quoted books speaking generally about requirements for borrowing, not words of this court interpreting ORS 261.305(6), but they may state the general purpose of such requirements well enough. They were pertinent to *Fullerton,* which was a borrowing case. In *Fullerton,* the district actually issued revenue bonds, claiming that no prior approval by the voters was needed because the amount of the bonds did not exceed "the ordinary annual income and revenue of the district." The issue was whether these words in what is now ORS 261.305(6) meant gross revenue or net revenue, and the court held that they meant the district's "ordinary net annual income" for the year in question. 185 Or at 38. But *Fullerton* did not deal with purchases. It did not hold that a PUD might not commit itself to a long-term power supply contract because the total commitment exceeds one year's net

income, as long as such income covers the payments due during the year. We decline to hold so now.

For the reasons stated in Part VII with respect to the cities, the PUDs did not enter into an unauthorized "guarantee" of the bonds issued by WPPSS, as distinct from the question whether they guaranteed the obligations of their fellow participants, discussed below.

IX. OTHER ISSUES

A. Delegation.

The opponents contend that the participants' covenant to maintain electric rates adequate to meet payments due under the agreement, *supra,* n.2, unlawfully binds the future leadership of the cities or districts or unlawfully delegates their ratemaking authority. In the interest of not further lengthening this opinion, we do not review and distinguish the opinions quoted for the limits on elected officials in this respect. The short answer is that if the cities and PUDs, in managing their electric utilities, have the authority to make long-term financial commitments payable exclusively from future electric revenues, they also have authority to promise that the revenues will be maintained at a level adequate to meet the commitments. Otherwise a contractual obligation limited to such revenues could be avoided simply by setting rates too low to meet it, which means that in practice it could not be negotiated at all, or that the contract would have to be executed as a general obligation to be paid from other sources, including taxes, with all the legal consequences of such an obligation. The opponents in fact concede that a city may enter into a rate covenant when authorized by statute, without offering a reasoned explanation why a statute could overcome what purports to be a fundamental principal of governmental responsibility.

The Participants' Agreement does not set specified electric rates for any participant. It does not let WPPSS set the rates. The cities and PUDs retain responsibility for determining their

rate schedules with respect to classes of service, classes of customers, minimum amounts, or whatever otherwise permissible variables they choose. They promised only to collect revenues adequate to cover their contractual obligations. That is not an unlawful delegation of power if the contractual obligations themselves are within their authority. These contentions therefore stand and fall with the opponents' challenge to the cities' and PUDs' authority to make the underlying contract.

B. **Public Policy.**

The PUDs argue, and the circuit court held, that the Participants' Agreement contravened the public policy expressed in the laws governing the PUDs' operations, ORS chapters 261 and 262. We note the difference between an argument that a contract among private parties is unenforceable under some governmental policy recognized by the courts and an argument that governmental action itself is against "public policy." When applied against governmental action, the "public policy" contention only argues for a nontechnical application of the policies and purposes of the governing statutes, and that is how the PUDs present it here. "Statutory policy" probably is a better term than "public policy" to avoid confusion between the two.

We have mentioned in Parts VII and VIII a possible issue whether the cities and the PUDs may turn out to have exceeded their authority in one respect which also is an issue of statutory policy. This issue may arise from the "step-up" clause § 17(c), which increases each participant's share under the agreement up to 25 percent to cover possible defaults by other participants. Insofar as the step-up clause covers assumption of a defaulting participant's share in the "dry hole" risk, that is to say, in the eventuality of a total failure of the projects, it may be argued to be a "guarantee" of the defaulting participant's debt rather than purchase of an increased share of project capability. Such a guarantee may be beyond the cities' respective authorities. It also may be contrary to the statutory policy of ORS 225.480, as

to the cities, and ORS 261.250, as to the PUDs, to which we have referred in Part III. We do not decide that question, because the only issue now before us is whether the agreements were invalid when the cities and districts entered into them, and a contingent promise to take an increased share of power or power capability would not necessarily be an impermissible "guarantee" at that time. Whether there are defenses arising out of developments subsequent to the cities' and districts' initial entry into the agreements is not before us in this appeal.

Apart from this possible issue, however, we think that the claim of statutory, or "public," policy adds nothing to the previous analysis of the statutory law itself. Statutes, of course, are susceptible to interpretation that takes account of their intrinsic policies and purposes. But if "public policy" were a separate and additional argument beyond the statutes, it would become a wild card in litigation that would undermine the ability to enter transactions in reliance even on the most sophisticated interpretation of the state's laws. As we find no violation of the statutes when the PUDs entered into the Participants' Agreement, we also do not find that they violated the state's public policy.

C. **Other States.**

We add a few words about the decisions of other supreme courts concerning these agreements.

The Supreme Court of Idaho has held that five Idaho cities exceeded their authority in entering the Participants' Agreement with WPPSS. *Asson v. City of Burley, Idaho,* 670 P2d 839 (1983). The court held that the obligations undertaken by the cities contravened the municipal debt limitation stated in Idaho's constitution. Article 8, section 3 of that constitution forbids any local government to "incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year" without a vote of qualified electors and provision for a tax to pay the interest and principal, and it provides that any indebtedness or liability incurred contrary to the section "shall be

void." The issue before the Idaho court was whether the cities' obligations to WPPSS escaped this debt limitation clause because repayments were to be made exclusively from utility revenues rather than taxes, and the court held that the clause nevertheless applied because past Idaho precedents had rejected the "special fund" doctrine that confines debt limitations to debts that expose future tax revenues. 670 P2d at 845-6, *citing Feil v. City of Coeur d' Alene,* 23 Idaho 32, 129 P 643 (1912). Although subsequent amendments of Idaho Constitution, Article 8, section 3, had exempted "special fund" financing for some purposes, the court held that the Participants' Agreement did not qualify under any theory.

Justice Bakes dissented. He maintained that "only because, through hindsight, the majority can see what a 'bad deal' the cities have made that they now attempt to extricate these cities from their precarious position" on constitutional grounds. The dissent also noted that the cities in fact might have defenses under ordinary contract law which were not involved in the constitutional challenge brought before the Idaho court, and concluded that the court "should not bend our Constitution in an effort to release from liability public entities who have improvidently, but constitutionally, entered into contracts from which they may also be relieved because of contractual defenses." 670 P2d at 851. In any event, the Idaho court's decision differs from ours simply because Oregon law does and Idaho law does not recognize the "special fund" rule that confines debt limitation clauses, unless otherwise stated or intended, to debts that potentially expose the government's tax revenues.

The Supreme Court of Washington, also in a split decision, relieved that state's municipal participants of their obligations on different grounds. *Chemical Bank v. Washington Public Power Supply System, supra.* The majority held that their agreement with WPPSS was ultra vires because, although each participant had authority to contract for the purchase of electric power, it did not have authority to contract to pay for power generating capability that might turn out to be zero. The

dissenters, Utter and Dolliver, JJ., would hold that the authority to purchase power also includes the authority to contract for a share of an uncertain supply of power yet to be developed. This dissent, like Justice Bakes's in Idaho, also protested that the majority undertook to save Washington municipalities from the consequences of the mismanaged WPPSS projects at the cost of narrowly restricting the authority of local governments to serve their citizens.

On this issue, our view of Oregon's tradition of local autonomy and local responsibility is closer to that expressed by Justices Utter and Dolliver than to the majority's restrictive reading of Washington law. As stated in Parts VI and VII of this opinion, once it is conceded that the cities and PUDs had authority to contract for a share of an uncertain amount of electric power at a price based on the proportionate costs of that share, no legal reason appears why their authority ceases at the point where the possibility of little power at exhorbitant cost includes the possibility of no power at all.

We therefore agree with the basic position taken by the defendant cities, Springfield, McMinnville and Milton-Freewater. A supplemental memorandum filed by these cities suggests that the Washington court's decision released so many of the other participants that by the terms of the Participants' Agreement itself any question of the Oregon cities' authority to enter the agreement is moot. That point may relate to the possible "contractual defenses" mentioned by Justice Bakes's dissent, above. It does not relate to the present action, which was brought by parties who seek to invalidate the transaction, not by parties who seek to enforce it. We therefore express no view of any defenses to such an action under the agreements. We hold only that the transactions were not beyond the authority of the cities and PUDS or otherwise illegal when they were made.

X. CONCLUSION

In summary, the issues in the present litigation are whether the plaintiffs' action should have been dismissed as untimely, and if not, whether the named Oregon cities and people's utility districts had authority in 1976 to enter into the Participants' Agreement, and whether in doing so they violated any limitations in their respective charters, in statutes, or in the Oregon Constitution. This case and our decision does not involve any question of anyone's present obligations if the agreements were validly made at that time.

The authority to make contracts for city and PUD electric utility systems and the limits on that authority have long-term importance beyond the WPPSS debacle. We judge these issues as of the time the transactions were made, not by hindsight. First, we agree with the cities of McMinnville, Milton-Freewater, and Springfield that the cities had authority under their respective charters to make the agreements. So did the PUDs under Article XI, section 12 of the Oregon Constitution and the statutes enacted to effectuate that section.

Second, we hold that the cities' and PUDs' existing authority was not narrowed by enactment of the Thermal Power Facilities Act or the Joint Operating Agency Act, with the possible exception that ORS 225.480 and ORS 261.250 may impose a statutory policy against guaranteeing the financial obligations of other participants through the "step-up" clause when no power is supplied in return. That possibility would not vitiate the entire transaction when made and it need not be decided now.

Third, the bonds issued by WPPSS were not the bonds of the individual participants, nor did the cities or PUDs issue bonds in another form without complying with the procedures required for that purpose. Also, the PUDs' agreement to pay WPPSS did not constitute borrowing by the PUDs so as to violate the statutory limits on such borrowing.

Fourth, we follow long-established Oregon law in holding that the agreements with WPPSS did not contravene the cities'

charter debt limitations because they were payable entirely from utility revenues, not from taxes. The agreements also did not represent an unconstitutional loan of credit to WPPSS, again because the cities' taxing power and future tax revenues were not obligated.

Fifth, the covenant to maintain utility revenues adequate to meet the participants' obligations did not delegate the cities' or the PUDs' future authority to determine the actual rates by which the revenues would be collected.

When all is said and done, this case is about the exercise of powers and responsibilities entrusted by the people of Oregon to their local officials. The constitution and the laws reflect that Oregonians have been of two minds about this as about other matters. At least since the beginning of this century, Oregon more than many states has wanted its local communities to be able to act autonomously to serve local needs or desires. This tradition of venturesome community action is embodied in the adoption of the home rule amendments in 1906 and 1958 and the people's utility district amendment in 1930. But the constitution and statutes also hedge public ventures with procedural and substantive limits on financing those ventures by debt. These legal powers and limits must be known with substantial certainty if the state and local communities are to deal with others in accomplishing their necessary or desired projects. For many years it has been understood that, unless the opposite intent is shown, debt limitations in Oregon refer to debts that obligate the community's tax revenues. Substantial certainty in future public transactions requires respect for existing legal rules and precedents, even when hindsight calls a particular transaction into question. If any city, or the legislature, wishes to tighten the rules for the future, it is in its power to do so.

The design of the agreements at issue in this case went to the bounds of Oregon law. The argument that the bounds were crossed has been ably and strongly presented, but ultimately it asks us to hold that the design was illegal as a whole though it remained within each separate rule. Retrospective judicial

evaluation of individual transactions by such a standard would not be a rule of law. Courts in other states have reached different conclusions under the laws of their states, which differ from Oregon's. The ultimate obligations and remedies of the present and other parties in the light of developments after 1976 are not before us now. We hold only that the Oregon cities and PUDs did not exceed the limits of their authority when they signed the Participants' Agreement at that time.

The decision to join in the agreement was one of policy for responsible public officials to make. It was made under conditions and on terms largely created by BPA, the federal agency on whom local public entities have been dependent for supplies of electric power. Officials responsible for electric utilities without generating capacity were led to believe that they had little alternative to the proposal offered them. Their policy decision to commit themselves to a share of the power WPPSS would undertake to produce at projects WNP 4 and 5, including the risk of high costs and little or no power, may have been wise or unwise when it was made. But it was a policy choice, not one for this court to undo by devising new law for the purpose.

The decision of the circuit court is reversed and the cases it remanded to that court for entry of a judgment and such further proceedings as may be necessary.

[1] This background is set out in greater detail in several sources. *See* Hittle, *et al., Pacific Northwest Power Generation, Multi-Purpose Use of the Columbia River, and Regional Energy Legislation: An Overview,* 10 Env L 235, 245-250, 262-274 (1980); Foote, Larsen and Maddox, *Bonneville Power Administration: Northwest Power Broker,* 6 Env L 831, 839-852 (1976); *Natural Resources Defense Council v. Hodel,* 435 F Supp 590 (1977); *Chemical Bank v. Wash. Pub. Power Sup. System,* 99 Wash2d 772, 666 P2d 329 (1983); *Asson v. City of Burley,* Idaho , 670 P2d 839 (1983).

[2] Section 6(c):

> "No Participant which is a statutory preference customer of Bonneville shall be required to make any payments to Supply System under this Agreement except from the revenues derived by such Participant from the ownership and operation of its electric utility properties. Such Participant covenants and agrees that it will establish, maintain and collect rates or charges for power and energy and other services, facilities and commodities sold, furnished or supplied by it through any of its electric utility properties which shall be adequate to provide revenues sufficient to enable the Participant to make the payments to be made by it to Supply System under this Agreement and to pay all other charges and obligations payable from or constituting a charge and lien upon such revenues."

[3] Section 17(c):

> "If the Participant is a municipal corporation, upon default on the part of any other such Participant(s) which is a municipal corporation the Participant's Share shall be automatically increased for the remaining term of this Agreement pro rata with that of other such nondefaulting Participant(s) to the extent that such defaulting Participant(s) fails or refuses for any reason to perform its obligations under its Participants' Agreement, and the Participant's Share of such defaulting Participant(s) shall be reduced correspondingly; *provided,* that the sum of all such increases for the Participant pursuant to this Subsection shall not exceed, without consent of the Participant, an accumulated maximum of 25% of the Participant's Share."

[4] The cities also did not make use of the authority given cities in ORS 225.060 "either severally or in joint agreement [to] purchase, own, operate and maintain any works in an adjoining state necessary or pertinent to the furnishing of electric power . . . ."

[5] The issue of financing state buildings by long-term leases in *Martin* was complicated by the fact that Or Const Art XI, § 7 was amended in 1964 to except such leases from the debt limitation. The court, and Justice O'Connell, concurring, found the exception inapplicable because the lease payments to the building authority were

pegged to recovery of costs, not to fair rental value. 276 Or at 150-158.

[6] *See* Or Const Art VIII, § 5; ORS 273.031.

[7] In addition to section 6(c), footnote 2, *supra,* section 6(d) provides:

> "The Participant shall make the payments to be made to Supply System under this Agreement whether or not any of the Projects are completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of either Project for any reason whatsoever in whole or in part. Such payments shall not be subject to any reduction, whether by offset or otherwise, and shall not be conditioned upon the performance or nonperformance by Supply System or any other Participant or entity under this or any other agreement or instrument, the remedy for any non-performance being limited to mandamus, specific performance or other legal or equitable remedy."

[8] One statute relating to municipal bond issues, ORS 287.004, generally limits a city's outstanding bonds to three percent of its property tax base but excepts bonds issued for "power" purposes (presumably electric power) among others. The same section expressly requires voter approval for city bond issues only when required by the city charter or by another statute.

[9] Springfield Charter, Art VII, § 54:

> "The common council of said city shall not in any way create any debts or liabilities which shall singly or in the aggregate exceed the sum of $500.00, except as in this charter otherwise specifically provided."

McMinnville Charter, ch XI, sec 64:

> "Except by consent of the voters, the city's voluntary floating indebtedness shall not exceed $100,000.00 at any one time. . . ."

Milton-Freewater Charter, ch X, sec 2:

> "Except by the consent of the voters the voluntary floating or warranted indebtedness of the city for general purposes shall not exceed $25,000.00 at any one time provided, that the legally authorized debt of the municipalities of Milton or Freewater existent at the time of the adoption of this Charter shall not be included in such indebtedness for purposes of calculating the limitation."

Drain Charter, ch XII, sec 1:

> "Except by consent of the voters, the city's voluntary floating indebtedness shall not exceed $25,000.00; not its bonded indebtedness $250,000.00 at any one time. Bonded indebtedness to be by amendment to charter. . . ."

Canby Charter, ch XII, sec 1:

"Except for bonds heretofore or hereafter authorized, the City's voluntary floating indebtedness shall not exceed $25,000.00. For the purposes of calculating the limitation, however, the legally authorized debt of the City in existence at the time this Charter takes effect shall not be considered, and all bonds of the City heretofore issued and unpaid at the time this Charter takes effect shall remain and continue to be the obligation of the City of Canby until the same are paid. . . ."

Cascade Locks Charter, ch X, sec 40:

"Except by consent of the voters, the city's voluntary floating indebtedness shall not exceed $2,500.00; nor its bonded indebtedness, $5,000.00 at any one time. . . ."

Bandon Charter, Art IX, sec 34 (1940):

"Unless otherwise authorized by the legal voters of the City of Bandon at a special election duly called and held for such purpose, the council shall not contract a voluntary floating indebtedness of said city in excess of the sum of $500.00 for general city purposes and the council shall not contract an indebtedness in excess of the sum of $1,500.00 for the maintenance and operation of its municipal utilities; no warrants shall be authorized by the council, nor be issued unless there is cash in the city treasury available for the payment of such warrant.

"Members of the city council, or any other city official or public employee, who shall authorize, incur, cause or create, or officially approve any such indebtedness in excess of said limitation, shall be jointly and severally liable, individually and personally, for the amount of such excess."

(This section was removed when the City of Bandon amended its charter in 1981.)

The charters of the cities of Drain, McMinnville, Cascade Locks and Canby also state:

"All city officials and employees who create or officially approve any indebtedness in excess of this limitation shall be jointly and severally liable for the excess."

Charters of the cities of Drain and Cascade Locks also provide:

"For purposes of calculating the limitation, however, the legally authorized debt of the city at the time this charter takes effect shall not be considered."

The McMinnville Charter contains the same provision, without the language "at the time this charter takes effect."

Under the Canby and McMinnville charters, the ordinary charter debt limitations do not apply, respectively, to revenue bonds of the Canby Utility Board and to warrants of McMinnville Water and Light Commission. Instead, the Canby Utility Board's authority to "borrow

money" for up to five years is limited to a stated percentage of revenue or plant value, Canby Charter ch XIII, §4(1). Similarly, the Springfield Utility Board's power "to borrow money either by the issuance of notes or bonds secured only by a pledge of [utility] revenues" is limited to 25 percent of the utility's original cost and to stated purposes. By their terms these provisions do not apply here, once the argument that the participants are the "borrowers" under bonds issued by WPPSS is rejected.

[10] *See* ORS 287,004, *supra* n.12.

[11] *See* 5 McQuillin § 2232 (1913, lst ed) stating that long-term contracts are debt and 5 McQuillin § 2228 (1913, lst ed) (payments from "special funds" are not debt).

[12] The court cited 5 McQuillin, Municipal Corporations, §§ 2227, 2228, and 2230, and the following cases as having approved the principles stated in those sections: *Morris v. City of Sheridan,* 86 Or 224, 233, 167 P 593 (1946); *Smith v. Jefferson,* 75 Or 179, 146 P 809 (1915); *City of Joseph v. Joseph Water Works Co.,* 57 Or 586, 111 P 864, 112 P 1083 (1910); *Kadderly v. Portland,* 44 Or 118, 151, 74 P 710, 75 P 222 (1903); *Little v. City of Portland,* 26 Or 235, 246, 37 P 911 (1894).

[13] "Public revenue," in the *Carruthers* opinion, referred to tax revenue.

[14] The section continues with a proviso adopted in 1917 to allow ports to offer a bonus in aid of water transportation.

Districts are municipal corporations. *In re People's Utility District,* 160 Or 530, 86 P2d 460 (1939). The PUDs' brief in this case adopts the arguments of the ratepayers and cities under Art XI, § 9.

[15] The creation and powers of corporations and the liability of their shareholders were controversial topics in the 1857 constitutional convention. They were coupled, significantly enough, with the topic of "internal improvements," meaning economic development. *See Carey,* The Oregon Constitution 147, 232-278. Or Const Art XI, § 2, which provided that "[c]orporations may be formed under general laws, but shall not be created by specific laws, except for municipal purposes," shows the 19th century usage of "corporation" to include municipal as well as business or other private entities.

[16] Or Const Art XI, § 12:

> "Peoples' Utility Districts may be created of territory, contiguous or otherwise, within one or more counties, and may consist of an incorporated municipality, or municipalities, with or without unincorporated territory, for the purpose of supplying water for domestic and municipal purposes; for the development of water power and/or electric energy; and for the distribution, disposal and sale of water, water power and electric energy. Such districts shall be managed by boards of directors, consisting

of five members, who shall be residents of such districts. Such districts shall have power:

"(a) To call and hold elections within their respective districts.

"(b) To levy taxes upon the taxable property of such districts.

"(c) To issue, sell and assume evidences of indebtedness.

"(d) To enter into contracts.

"(e) To exercise the power of eminent domain.

"(f) To acquire and hold real and other property necessary or incident to the business of such districts.

"(g) To acquire, develop, and/or otherwise provide for a supply of water, water power and electric energy.

"Such districts may sell, distribute and/or otherwise dispose of water, water power and electric energy within or without the territory of such districts."

Although this provision uses the spelling "Peoples'," the statutes use "people's." We follow the statutory spelling as more grammatical.

[17] ORS 261.305(6):

"To borrow money and incur indebtedness; to issue, sell and assume evidences of indebtedness; to refund and retire any indebtedness that may exist against or be assumed by the district or that may exist against the revenues of the district and to pledge any part of its revenues. Except as provided in ORS 261.380, no revenue or general obligation bonds shall be issued or sold without the approval of the qualified voters. The board of directors may borrow from banks or other financial institutions, on notes payable within 12 months, such sums as the board of directors deems necessary or advisable; however, the amounts so borrowed, together with the principal amounts of other like borrowings then outstanding and unpaid, shall not exceed the amount which the board of directors estimates as the district's net income (determined in accordance with the system of accounts maintained by the board pursuant to ORS 261.470) for the 12 full calendar months following the date of the proposed borrowing, adjusted by adding to the net income an amount equal to the estimated charges to depreciation for the 12-month period. No indebtedness shall be incurred or assumed except on account of the development, purchase and operation of a utility."

LENT, LINDE, and ROBERTS, JJ., concurring.

The proponents of the validity of the challenged transactions contend that the plaintiffs' action is barred by laches or estoppel. Some members of the court believe that the issue of laches need not be reached if the plaintiffs' claim loses on the merits. We believe that it should be decided first. The court also is divided on the correct analysis.

"Laches" and "estoppel" are not different words for the same issue. A defendant's claim of laches arises from a plaintiff's prejudicial delay in asserting a claim for equitable relief, while conduct that gives rise to equitable estoppel, whether or not involving delay, vitiates the merits of the estopped party's claim. A defendant's assertion that a plaintiff is barred by laches from pursuing the claimed relief therefore should be dealt with before deciding the case on its merits. When laches is correctly seen as a time bar to plaintiff's action, like a statute of limitations, the claim must be disposed of before reaching the merits, not as a final obstacle to otherwise proper relief. If the only plaintiff or all plaintiffs in a case are disqualified by delay in commencing litigation, there is no party in a position to press the case. Litigation of the merits then is wasted time and effort and, on appeal, would reduce an opinion on the merits to dicta.

Here the opponents of the transaction argue that laches does not apply against governmental agencies, or if it sometimes can apply, then not under the circumstances of this case. This court has never arrived at a coherent analysis of Oregon law on this issue. It does not agree on a coherent analysis today. Statement of a rule is not simple, because Oregon law has developed partly from statutory policy and partly from cases that follow no consistent principle. Nevertheless, a principle emerges from the statute and past holdings that is sufficient for the present case. Because we believe it essential to identify one or more plaintiffs who are not barred by laches before the court reaches the merits, we analyze the court's past opinions and the applicable premises in some detail. We

conclude that laches does not bar litigation solely between governmental units or officials that is designed to determine the legality of a governmental program or activity.

"Laches" means neglect or inaction, as in "laxness" or "laxity." The statutory time period within which to commence an action at law presumptively indicates what is reasonable or unreasonable also for equitable relief, but the presumption can be overcome. *Albino v. Albino,* 279 Or 537, 553, 568 P2d 1344 (1977); *Willis v. Nehalem Coal Co.,* 52 Or 70, 90, 96 P 528 (1908).

It may be that if a private party had entered into a formal transaction as far-reaching and important as the one before us, on the strength of which others had irreversibly committed themselves to large and irrecoverable expenditures, and if the party waited five and one-half years to sue to be released from that transaction on grounds that it could not properly enter into it, the party's request for equitable relief would be barred by laches even though the statute allows six years to commence actions "upon a contract or liability." ORS 12.080. This is not an action upon a contract but to declare that no legal contract was made. But the cities and the PUDs are not private parties, and the ratepayers, who are private persons, were not parties to the challenged transactions. We therefore must examine how delay affects their rights to equitable relief.

Laches is often described as a "doctrine," and "doctrines," as compared with rules of law, are distinguished more by broad statements than by sharp cutting edges. This court's experience with fitting the doctrine of laches to the powers and duties of government is no exception.

The court early postulated that statutes of limitation do not run against the state, a postulate it found in the Latin *nullum tempus occurit regi,* unless the statute provides otherwise. *State of Oregon v. Warner Valley Stock Co.,* 56 Or 283, 308, 106 P 780, 108 P 861 (1910). The statutes did in fact provide otherwise from the enactment of section 13 of Deady's Code in 1862 until its amendment in 1903, Gen Laws § 13, p 18 (1903).

See State Land Board v. Lee, 84 Or 431, 435-436, 165 P 372 (1917). The present statute, ORS 12.250, provides:

> "Unless otherwise made applicable thereto, the limitations prescribed in this chapter shall not apply to actions brought in the name of the state, or any county, or other public corporation therein, or for its benefit."

In the *Warner Valley Stock Co.* case, the court held that the state had failed adequately to allege and prove an excuse for its delay in suing to set aside certain deeds but should be allowed to amend its pleading, thus implying without discussion that the state's suit otherwise would be barred. 56 Or at 304, 312. On the strength of the implication in that case, the court in the next such suit said that it was "committed to the principle that the doctrine of laches is applicable to the state," but it held that laches was not shown. *State of Oregon v. Hyde,* 88 Or 1, 40, 169 P 757, 171 P 582 (1918). Whether or not the quoted statement was justified when applied to suits to undo past conveyances, those cases gave no occasion to consider its wider implications, for instance for suits directed at preventing continuation of an unlawful condition or activity.

Nevertheless, the court later quoted the broad sentence that "doctrine of laches is applicable to the state" in cases in which the name of the state appeared only pro forma in actions by private relators to challenge the legality of school districts. *State ex rel v. School District No. 23,* 179 Or 441, 461, 172 P2d 655 (1946); *State ex rel School District No. 9,* 148 Or 273, 287, 31 P2d 751, 36 P2d 179 (1934). *See also State v. Union High School,* 152 Or 412, 53 p2d 1047 (1936). To apply the doctrine there the court had to turn what the statutes denominated as an "action at law" back into the extraordinary writ of quo warranto which the statutes had abolished and about which the court earlier had said that "[i]t is seldom that laches are imputed to a State in a *quo warranto* action to test the legality of an incorporation where the rights of the public are involved." *State ex rel v. Port of Tillamook,* 62 Or 332, 344, 124 P 637 (1912). The opinion in the *School District No. 9* case, *supra,* distinguished *quo warranto* actions brought to assert a public

interest, in which the state is the real party in interest, from others brought in the name of the state by private parties in their own interest, and the court found the case to be of the latter kind. 148 Or at 276-278. Again, in the *School District No. 23* case, *supra,* the court found that "the relator, and not the state, is the interested party," before holding that a delay of one year barred a taxpayer with knowledge of the facts from challenging the legality of the district and causing what the court described as "deplorable consequences." 179 Or at 458-462.

The school district cases were treated as private actions by virtue of the characteristics of the relators and their interests. But when the state sued to set aside a probate order and to declare the decedent's property escheated to the state, the court rejected a defense of laches on the ground that it was not available against a suit by the government "to enforce a public right or to protect a public interest." *State v. Vincent,* 152 Or 205, 214, 52 P2d 203 (1936).

Two decisions of that period involved the defense of laches against suits on behalf of local governments. In *Amer. Surety Co. v. Multnomah County,* 171 Or 287, 138 P2d 597 (1943), plaintiff sued as subrogee of Marion County and defendant claimed laches. Plaintiff apparently conceded that "the sovereign is not exempt from the defense of laches," but the court found it unnecessary to consider the defense because the action was at law. 171 Or at 324-328. *City of Pendleton v. Holman,* 177 Or 532, 164 P2d 434 (1945), was a suit to foreclose the lien of a street improvement assessment. Most of the opinion was devoted to rejecting defendants' argument that the statutes of limitations, though by then expressly excluding actions brought by governmental plaintiffs, nevertheless should apply against a city acting in its "private or proprietary capacity." The opinion described the street improvement as a "proprietary activity," and it again assumed without discussion that the foreclosure suit would be barred by laches, although the court held that the defendants had failed to plead the factual basis of this defense. 177 Or at 548. But in a third case, a school district's action to

recover funds paid out by a bank, the court stated that it was "not here concerned with private dealings but with matters affecting the public," and referred to the " 'well-settled' " doctrine that " 'no laches can be imputed to a municipal corporation, acting . . . in a public and governmental capacity.' " *School Dist. 47 v. U.S. Nat'l Bank,* 187 Or 360, 383-384, 211 P2d 723 (1949), *quoting Common School Dist. No. 61 v. Twin Falls Bank & Trust Co.,* 50 Idaho 711, 4 P2d 342 (1931).

The most recent discussion of laches as a defense against a belated claim by the state occurred in *Corvallis Sand & Gravel v. Land Board,* 250 Or 319, 439 P2d 575 (1968). That was a suit by a private company to enjoin an ejectment action brought against it by the State Land Board in order to establish the state's title to a riverbed, and the court noted that ejectment is an action at law and "laches is available only against a party seeking the aid of equity." 250 Or at 324. Nevertheless, Justice Lusk, for the majority, proceeded with an extended review of the foregoing precedents, quoting from *State v. Vincent, supra,* that laches will not bar a suit "to enforce a public right or to protect a public interest," 250 Or at 332, and concluding that the state's action sought to establish a title held in the state's governmental rather than its proprietary capacity. The opinion denied that the *Warner Valley Stock Co.* case had involved a "proprietary" rather than "governmental" claim and declared the statement in the *Hyde* case that the court was "committed" to applying laches against the state to rest "upon an insecure foundation." 250 Or at 326-328.[1] Justice O'Connell, dissenting, maintained that these distinctions could not decide the fairness of allowing the government a delayed claim against a private party. Because the real controversy was over the right to gravel, which the state dealt with in the same manner as private persons, he would have applied laches in the same manner as in litigation between private parties. 350 Or at 330, 342.

Undeniably the distinctions between "public" and "private" rights or between "governmental" and "proprietary" functions are inexact tests for barring delayed suits by the state or local governments. As Justice O'Connell wrote, they may

serve to label easy cases but fail in difficult ones. 250 Or at 341, n.4. Moreover, those phrases are employed in other contexts where other rules or policies may cause these lines to be drawn differently than in the context of defenses against belated assertions of legal claims. Little is gained by describing an activity, for instance the construction, operation, and maintenance of streets or other public facilities, as "proprietary" for purposes of one legally correct outcome and "governmental" for purposes of another. Nor is it selfevident why an action to escheat a decedent's property asserts a "public" interest but an action challenging the legality of a school district asserts only a "private" interest when initiated by a taxpayer. *Compare State v. Vincent, supra, with State ex rel. v. School District No. 23, supra.*

Shortcomings in judicial formulas, however, do not prove error in the holdings they seek to express. The foregoing cases show that in barring suits by government for laches, lines sometimes have been drawn by the characteristics of the plaintiff, by the interest asserted, or by the relief sought. The lines obviously seek to accommodate competing policies, to preserve the legal responsibilities of government on one hand and fairness to those against whom government litigates on the other, but it does not follow that a balance between these policies simply is struck for each case. Without attempting a comprehensive statement in this case, we find in the past decisions elements for an analysis besides those already discussed.

First, the fact that "laches" is an equitable doctrine rather than statutory law tends to mask the fact that its application against the government nonetheless is as much a question of law as the application of a statute of limitations. Even when government sometimes acts like a private party, the two differ insofar as the state, unlike a private party, can legislate for itself whether to be bound by periods of limitation. *Cf. Wiggins v. Barrett & Associates,* 295 Or 679, 700-701, 669 P2d 1132 (1983) (concurring opinion). The legislature has done so in ORS 12.250, previously quoted, which exempts both the state

and local entities from general periods of limitation. Obviously, the state's policy toward delayed private litigation is not its policy toward delayed litigation by governmental plaintiffs.

To interpret a statute of limitations which is silent with respect to government as not binding the state attributes that policy choice to the state itself. In *Withers et al. v. Reed,* 194 Or 541, 243 P2d 283 (1952), which concerned a statute terminating unused water rights, the court concluded that although the statute did not expressly apply to rights held by the state, its dominant policy was to return the water to potential beneficial use by others. Justice Lusk's lead opinion for three members of the court observed that "*nullum tempus occurrit regi*" depends on policies implied in the face of legislative silence. Relevant here is his quotation of "the classic exposition of the doctrine" by Justice Story in *United States v. Hoar,* 2 Mason 311, 313 (1821):

> " 'The true reason, indeed, why the law has determined, that there can be no negligence or laches imputed to the crown, and, therefore, no delay should bar its right, (though sometimes asserted to be, because the king is always busied for the public good, and, therefore, has not leisure to assert his right within the time limited to subjects,) is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation or exception, introduced for the public benefit, and equally applicable to all governments.* * *' "

quoted in 194 Or at 544-545.

The "great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers," sometimes requires belated legal action by those officers, or by their successors. Sometimes it requires legal action by private citizens in the name of the state or in other forms of action provided for the purpose. If a policy governing

laches is to allow for preserving public property as well as public rights, it cannot well exclude the "proprietary" activities of public agencies. Some public agencies, like the people's utility districts in this case, exist only for "proprietary" functions of delivering goods and services; they do not "govern" people.

Why should the government, or an interested citizen, ever be barred from confining governmental action within legal bounds and from calling upon a court to declare and enforce those bounds? As this court's past opinions show, the early generalization that "the doctrine of laches is applicable to the state" was too broad. Yet the opposite need not be true, that laches never applies.

When the state sends its agencies into the market to engage in ordinary commercial and property transactions indistingushable from those of private enterprises, the state's implied policy may be to give those transactions the same security against belated litigation of ordinary disputes. Early decisions stretched concepts such as "proprietary activity" in order to extend that security to private interests in property, particularly real property. This may explain barring the city's belated lien foreclosure in *City of Pendleton v. Holman, supra,* as well as the suits to set aside deeds in the *Warner Valley Stock Co.* and *Hyde* cases, *supra.* There is less reason to assume such a policy toward actions seeking declaratory or prospective relief from continuing a disputed transaction or condition, as in *Corvallis Sand & Gravel v. Land Board, supra.*

Assuming there is a policy implicit in the state's commercial or property transactions to secure private parties against the belated assertion of ordinary legal claims, this policy does not bar the present litigation for laches. The parties to this litigation are governmental entities, except for the ratepayers.[2] WPPSS is a statutory agency and municipal corporation of the State of Washington, composed of other public agencies of that state. *See Chemical bank v. WPPSS,* 99 Wash2d 772, 666 P2d 329 (1983). The participants' agreements are not ordinary transactions with private parties in the commercial marketplace. They were designed for governmental entities, with the

active participation of the federal Bonneville Power Administration (BPA), and with conscious concern about the legal powers of the participating agencies. They are agreements between governmental officials to create and conduct a publicly administered program. The implicit policy of protecting existing property interests of private persons against delayed lawsuits when a public agency has dealt with them in a conventional commercial or property transaction simply does not apply to this program. The larger policy that normally excludes laches in actions brought to assert a public interest in the conduct of a public program does apply, at least as to the municipalities that are challenging the program.

A few cases elsewhere contain statements to the contrary. In a dispute between a county and certain municipalities over the distribution of fuel taxes, an Arizona court stated the rule that "neither laches nor its generic parent, estoppel, can be asserted to gain rights against the public or to defeat a public interest." But the court then continued that "the reason for the rule denying the defense disappears when the contest is solely between two public bodies." *Maricopa County v. Cities & Towns of Avondale, Et Al.,* 12 Ariz App 109, 113, 467 P2d 949 (1970). It appears that the court was influenced by the idea that some taxpayers might gain and others might lose by a judicial examination of the financial distribution. Such a rule would prevent challenges to governmental illegality merely because the private interests of the taxpayers of the government which acted illegally would be adversely affected by ending or correcting the illegality. That is not a persuasive reason why alleged governmental irregularities should escape scrutiny.

The Arizona court cited two other cases. In *State ex rel v. Clay County,* 226 Iowa 885, 285 NW2d 229, 235 (1939), a dispute about which county was liable for a person's support in the state hospital, the opinion recognized the general rule against applying "laches" to the acts of governmental agents to be "for the protection of the public," but as between two counties the court saw "no good reason why public policy should require that the people of one be penalized for the

laches of the representatives of another." This Iowa opinion discussed both estoppel and laches without making a clear distinction between them. It appears that in the quoted sentence, the court addressed the effect of an earlier neglect by one county on the merits of its position rather than the procedural effect of delay in commencing the suit.

The other precedent cited by the Arizona court, *Royal Oak Tp. v. School Districts No. 7,* 322 Mich 397, 403, 33 NW2d 908, (1948), states that Michigan law applies the doctrine of laches between municipal corporations. But the Michigan court's full statement also rejects the rule that laches does not bar a municipality's enforcement of "public rights," apparently against anyone. Oregon law differs from Michigan. This court's decisions recognize the "public rights" exception to laches in suits by the state, *State v. Vincent, supra,* or initiated by local relators, as in the *School District No. 9* and *Port of Tillamook* cases, *supra.*

The three cases from other states do not state the law in Oregon. The directive of ORS 12.250, that the general limitation periods "shall not apply to actions brought in the name of the state, or any county, or other public corporation therein, or for its benefit," applies to actions by governmental bodies in their "proprietary" capacities. *City of Pendleton v. Holman, supra,* citing *American Surety Co. v. Multnomah County, supra, Seeck v. City of Lebanon,* 148 Or 291 (1934). About the contention that actions by municipalities should be time-barred if they concerned "proprietary activities," the court wrote:

> "Had it been the intention of the legislature to subject municipalities to the operation of the statute of limitations in their proprietary activities, it could have accomplished its purpose in one of two ways. Either it could have repealed outright § 13 of the 1862 Code of Civil Procedure, or, in the amendment of that section in 1903, it could have exempted municipalities from the operation of the statute

> only to the extent of their public or governmental functions. It did neither."

177 Or at 541. In a fairly recent case, *Chizek v. Port of Newport,* 252 Or 570, 450 P2d 749 (1969), the court cited ORS 12.250 and the quotation from *State Land Board v. Lee, supra,* that the principle of denying limitations against government is "to preserve public rights, revenues and property from injury and loss by the negligence of public officers." 84 Or at 434. The court allowed the port belatedly to set aside an adverse title gained by an invalid tax foreclosure, obviously a "proprietary" issue:

> "When the property of one division of government is lost to another division of government and then sold to a private party, the public is not served. The only party who gains is the purchaser at the foreclosure and there is no policy reason to prefer him over a public body.
>
> "We hold that the Port, as a public body, is not barred by the statute of limitation and the tax foreclosure proceeding is invalid and, therefore, the plaintiffs secured no title to the disputed property."

252 Or at 578.

The law in this state is that actions by the state or municipalities are not barred by the statute of limitations, irrespective whether they concern "proprietary" activities, as most civil actions do. ORS 12.250. That is the state's announced public policy on the question, and this court so treated it as recently as 1969.

It makes no sense to draw a line for imposing time limitations on declaratory judgment proceedings by a governmental plaintiff that would depend on whether the proceeding is characterized as being "in law" or "in equity." if an action under chapter 28 simply asks for a declaration of the legal rights, status, or relations of the parties, ORS 28.010, no limitation under ORS chapter 12 would apply irrespective whether the subject matter concerns "proprietary" activities.

Nor would it apply to a damage action for breach of contract, fraud, negligence, or whatever. ORS 12.250. Moreover, insertion of such a line around equitable relief arising from "proprietary" activities, as the Chief Justice's concurring opinion proposes, then carries with it a further exception for claims by governmental plaintiffs that their past actions were "ultra vires," forcing trial courts to litigate that difficult and imprecise issue at the initial stage of determining whether the plaintiff is barred by time from maintaining the litigation.

Despite expressions in some of the early opinions we have reviewed, the court's holdings do not establish such a rule. The holdings generally have rejected claims of laches against public plaintiffs asserting public rights. The few exceptions have been cases protecting a private party's reliance on past governmental property or business transactions. With governmental agencies on the opposing sides, this is not such a case. As to these contending agencies, the applicable principle, recognized in ORS 12.250 and quoted by Justice Lusk, is " 'the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers.' " *Withers et al v. Reed, supra,* 194 Or at 545 (quoting *United States v. Hoar,* 2 Mason 311, 313.) That principle prevents barring the cities from pursuing this declaratory judgment action against WPPSS, despite the undoubted "proprietary" character of their electric utility functions.

[DeFazio v. WPPSS]

[1] The court found it difficult to explain its then recent decision in *Johnson v. Tax Commission*, 248 Or 460, 435 P2d 302 (1967), which held an assessor estopped, in his obviously public function of tax collection, to insist on a filing deadline which the taxpayer missed because the assessor sent him an outdated form. The court simply described it as an "exception." 250 Or at 329. In any event, as the lead opinion in *Wiggins v. Barrett & Associates*, 295 Or 679, 669 P2d 1132 (1983) makes clear, *Johnson* and its successor, *Pilgrim Turkey Packers v. Dept. of Rev.*, 261 Or 305, 493 P2d 1372 (1972), dealt with estoppel, not with a defense of laches based on delay.

[2] None of the rural electric cooperatives that have fractional participation in the Participants' Agreements are parties here, and their characterization as private or government-sponsored entities is immaterial to the present point. Nor are private lenders or suppliers to WPPSS parties to this litigation.

PETERSON, C.J., concurring.

I join without reservation in the opinion of the court.

As is apparent from the separate concurring opinion of Lent, Linde and Roberts, JJ., the court is not in agreement on the laches question.

The main underpinning for their conclusion that laches does not apply appears to be that because a substantial part of this litigation is between governmental agencies and concerns the powers of those agencies, this case does not fit the assumptions for an implicit policy of the state to apply laches against belated claims of its own agencies. Such discussion as there is to support the stated conclusion is found at pages 12-13 of the concurring opinion where this statement is made:

> "Assuming there is a policy implicit in the state's commercial or property transactions to secure private parties against the belated assertion of ordinary legal claims, this policy does not bar the present litigation for laches. The parties to this litigation are governmental entities, except for the ratepayers. WPPSS is a statutory agency and municipal corporation of the State of Washington, composed of other public agencies of that state. *See Chemical Bank v. WPPSS,* 99 Wash 2d 772, 666 P2d 329 (1983). The participants' agreements are not ordinary transactions with private parties in the commercial marketplace. They were designed for governmental entities, with the active participation of the federal Bonneville Power Administration (BPA), and with conscious concern about the legal powers of the participating agencies. They are agreements between governmental officials to create and conduct a publicly administered program. The implicit policy of protecting existing property interests of private persons against delayed lawsuits when a public agency has dealt with them in a conventional commercial or property transaction simply does not apply to this program. The larger policy that normally excludes laches in actions brought to assert a public interest in the conduct of a public

program does apply, at least as to the municipalities that are challenging the program." (Footnote omitted.) Or at .

Their concurrence strikes me as lacking analysis to support the stated conclusion. If laches is otherwise assertable, why should the laches rule differ if the suit is between governmental bodies? I believe that the rule should be the same in both situations. Let me give an example to put the issue in clearer perspective.

Suppose the city of Drain (Drain is a small community south of Springfield. Both are parties in this case.) concurrently contracts with two parties for electrical power. One contract is with the city of Springfield; the other is with a private supplier, PNW Electric. Suppose that identical contract disputes arise between Drain and its suppliers and Drain seeks equitable relief. Finally, suppose that Drain is guilty of laches.

Under the theory of the other concurring opinion, PNW will successfully defend the Drain claim because laches will bar Drain's claim. Springfield's attempt to invoke laches will not succeed because it, like Drain, is a public body. Springfield and its citizens will be required to perform obligations which its private counterpart, under identical circumstances, will not be required to pay or perform.

The point is that if, under the facts of any case, equitable relief should be denied because it is inequitable to enforce the claim, whether the party invoking laches is a private person or a municipal corporation is beside the point. That has been the decision of every court which has considered the matter.[1] It should be ours as well.

In *Maricopa County v. Cities & Towns of Avondale,* 12 Ariz App 109, 467 P2d 949 (1970), a county sought to recover the amount of use fuel tax monies it had mistakenly paid to the defendant cities and towns. The court held that laches may defeat the claim, saying:

"Laches may also defeat a claim for restitution. Restatement, supra, § 148. Laches involves an unreason-

> able delay after knowledge of the facts which works a hardship. *Id.* The County contends here that laches cannot be so applied as to bar a claim by a public body in its governmental capacity. We agree to the extent that neither laches nor its generic parent, estoppel, can be asserted to gain rights against the public or to defeat the public interest. [Citing cases.] But the reason for the rule denying the defense disappears when the contest is solely between two public bodies. State ex rel. O'Connor v. Clay County, 226 Iowa 885, 285 NW 229, 235 (1935). Accordingly, as between municipal corporations, the defense of laches is available. Royal Oak Township V. School District No. 7, 322 Mich. 397, 33 N.W.2d 908, 911 (1948)."

The Michigan court reached the same result in *Royal Oak Tp. v. School Dist. No. 7,* 322 Mich 397, 33 NW2d 908 (1948). The Michigan court, in rejecting the claim that laches was not applicable against a municipal corporation, stated that "the law is well settled that as between municipal corporations the equitable doctrine is applicable."

The Supreme Court of Iowa, in *State ex rel O'Connor v. Clay County,* 226 Iowa 884, 285 NW 229, 235 (1939), applied laches, saying:

> "Public policy in some cases does forbid the application of the doctrine of laches to the acts of an arm of the government through its representatives. This is for the protection of the public. But where two counties are the interested parties there is no good reason why public policy should require that the people of one be penalized for the laches of the representatives for the other. The law should as far as possible, protect both, without preference to either."

See also Independent School District No. 4. v. State Board of Ed., 451 P2d 684, 687 (Okla 1969).

The cited cases state a rule directly contrary to the conclusion of the other concurring opinion. In Arizona and

Iowa, similar to Oregon, the general rule is that public policy forbids the application of laches to an arm of the government if a public right or public interest is at issue. In both of the cited cases from Arizona and Iowa, the courts nonetheless applied laches in cases involving governmental acts. In Oregon we have followed the government/proprietary distinction; laches is available as a defense to a claim of a public body acting in a proprietary capacity. Making laches available as between public bodies, especially when the actions at issue are proprietary, is consistent not only with our precedents, but with the policy cited above that the citizens of one public body should not be penalized for the laches of the representatives of the other.[2]

Laches is the label for a rule that relief will be denied as inequitable in those cases in which unreasonable delay in asserting rights results in disadvantage or prejudice. The rule is of long standing. The reasons for applying laches in disputes between governments are as applicable here as in a "conventional, commercial or property transaction," (Or at , separate opinion at 13) and we should not abandon the doctrine in this case. If laches is made out, I would grant public bodies no fewer rights than private concerns. I see no reason to change the laches rule simply because the dispute is between public bodies.[3]

Because of the court's unanimous decision that the local public bodies who entered into the challenged agreements had legal authority to do so, it is not necessary to decide whether the trial court erred in striking the WPPSS laches affirmative defense. Therefore, all statements made in the concurring opinions concerning laches are dicta (except for this sentence).

Campbell, Carson, and Jones, JJ., join in this concurring opinion.

[1]The writers of the other concurring opinion state that "[a] few cases contain statements to the contrary." Or at . I have found no case that holds that if laches otherwise were a defense it would not apply because both parties are public bodies.

[2]Furnishing electric power is a proprietary function. *Twohy Bros. Co. v. Ochoco Irr. Dist.*, 108 Or 1, 40, 210 P 873, 216 P 189 (1922).

[3]I also disagree with a number of other statements contained in the other separate opinion but will not take the time and space to explain the reasons for my disagreement. The writers of that opinion would inter the governmental/proprietary distinction which has been applied in a number of cases and would overrule our precedents denying relief to private relators. Or (separate opinion at 11-12).

No. 83-1619

IN THE
Supreme Court of the United States
October Term 1983

CHEMICAL BANK and
WASHINGTON PUBLIC POWER SYSTEM,

Petitioners,

v.

GARY ASSON, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF IDAHO

RESPONSE OF CITY OF HEYBURN TO PETITION FOR CERTIORARI

STEVEN A. TUFT
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(208) 678-9088

April 27, 1984

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Heyburn requests that the petition of Chemical Bank and Washington Public Power Supply System (hereinafter "petitioners") for issuance of a Writ of Certiorari to the Supreme Court of the State of Idaho be denied.

Position of the City of Heyburn

The city of Heyburn maintains that it (and the other four Idaho cities) had constitutional and statutory authority to enter into the Participants Agreements with Washington Public Power Supply with regard to nuclear projects 4 and 5. The Idaho Supreme Court concluded that the five Idaho cities did not have authority pursuant to its construction of Article 8, Section 3 of the Idaho Constitution (Opinion contained at Appendix A of Petition for Certiorari also reported as 105 Idaho 422, 670 P. 2d 839).

Heyburn does not agree with the decision of the Idaho Supreme Court. It seems to have ruled contrary to the previously announced tests for constitutionality of such agreements set forth in *Pocatello v. Peterson*, 93 Idaho 774, 473 P. 2d 644 (1970), without overruling it or adequately distinguishing it. However, Heyburn cannot find sufficient grounds to petition this court for a Writ of Certiorari. There appears to be no vested right of any person in decisions of a court and a change of decision of a state court does not unconstitutionally impair a contract or property right of persons relying upon prior decisions of that court. *Fleming v. Fleming*, 264 U.S. 29 (1924). While Heyburn disagrees with the decision, it was rendered by the highest court competent to rule thereon. The decision is now part of the body of law of the state of which Heyburn is a political subdivision. Heyburn finds no lack of any due process nor can it join in petitioners' other grounds for review.

Reasons why the Writ should be Denied

Heyburn maintains that the arguments set forth in the Petition for Certiorari of Chemical Bank and Washington Public Power Supply System are not grounds for issuance of the writ as follows:

(a) *Reliance On Facts Outside The Record.* Petitioners have set forth numerous facts which are not in the

record. The Idaho Supreme Court case was an original proceeding and was tried on a stipulated statement of facts, a copy of which has been previously forwarded to this court by the ratepayer respondents. Petitioners allege that the respondent municipalities by their actions have effected some form of unconstitutional taking or otherwise unconstitutionally impaired the bondholders' property or contract rights. In arriving at their conclusion, they set forth numerous facts which are, at best, in dispute and were never part of the record. A summary review of the stipulated facts which constituted the record before the Idaho Supreme Court will clearly substantiate this statement. As examples are such allegations as the cities' "guarantee" of the bonds, the cities' "abrupt" reversal of position, and other statements implying that the cities "deliberately created" or "repeatedly reinforced bonholder expectations." Such statements are disputed by the municipal respondents and, in any event, alien to the record before this court.

(b) *Mootness.* The same parties to this petition were also involved in the case of Chemical Bank of New York, Plaintiff, versus Washington Public Power Supply System, et al, Defendants, in the Superior Court of the State of Washington, in and for the County of King, Case No. 82-2-06840, the Honorable Joseph Coleman presiding. The Washington State Supreme Court reversed an interlocutory order of Judge Coleman and went on to hold that the Washington municipalities and public utility districts lacked statutory authority under Washington law to enter into the Participants Agreements with Washington Public Power Supply System with regard to Projects 4 and 5. Based thereon, Judge Coleman ruled orally on August 9, 1983, that the remaining participants (which included the five Idaho cities) were relieved of any contractual obligation to make payments to the Washington Public Power Supply System with regard to such Participants Agreements, basically, on a theory of

frustration of purpose. Such oral decision was reduced to a written decision on August 11, 1983. A copy of the written decision is attached as Exhibit "1".

It is the position of the City of Heyburn that such decision by Judge Coleman rendered moot the need for a decision from the Idaho Supreme Court as to the authority of the five Idaho cities to enter into the Participants Agreements. Heyburn firmly maintains that the Idaho Supreme Court opinion issued on September 26, 1983, holding the Idaho cities without constitutional authority to enter into the contracts was superfluous and moot, the cities having been relieved of any contractual obligation to make payment by Judge Coleman. The decision of the Idaho Supreme Court need not be reviewed by this court for the same reason.

(c) *Lack Of Merit.* The allegations of petitioners, that the proceeding before the Idaho Supreme Court constituted an unconstitutional taking of bondholders' property or interference of contract or contractual expectations of the bondholders are frivolous and not supported by the authorities set forth in the petition.

Conclusion

As disappointing as the decision of the Idaho Supreme Court was, the City of Heyburn regrettably conceeds that such grounds do not constitute sufficient basis for issuance of the writ.

Thus, the City of Heyburn concludes that this Honorable Court is obliged to deny the writ.

DATED this 27th day of April, 1984.

Respectfully Submitted,

STEVEN A. TUFT, ESQ.
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P.O. Box 1286
Burley, Idaho 83318
(208) 678-9088

Counsel for Respondent,
City of Heyburn

EXHIBIT 1

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

CHEMICAL BANK, a New York corporation, *Plaintiff,* v . WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Washington municipal corporation and joint operating agency; et al., *Defendants.*	No. 82-2-06840-3 ORDER AND JUDGEMENT

On June 15, 1983 the Washington Supreme Court filed an Opinion on discretionary review of certain orders entered by this court on November 16, 1982 and January 4, 1983. Plaintiff Chemical Bank ("Chemical") and defendant Washington Public Power Supply System ("WPPSS") thereafter filed a motion for reconsideration. On July 22, 1983 the Washington Supreme Court entered its Order Denying Motion For Reconsideration and issued its Mandate directing this court to proceed in accordance with the June 15, 1983 Opinion.

Following the announcement of the Washington Supreme Court's Opinion on June 15, 1983, the various defendants listed in Exhibit A attached hereto (hereinafter called the "moving defendants") filed motions in this court for summary judgment or entry of judgment or filed joinders in such motions.

Oral argument on the motions was heard before the undersigned judge of this court on August 8, 1983. All parties and their counsel were given an opportunity to pre-

sent their arguments, and the court heard and has duly considered all arguments presented at the hearing. In addition, the court has read and has duly considered the pleadings, papers and materials filed in this action which are listed in the Appendix attached hereto and by this reference incorporated herein.

The court announced its oral decision on the aforesaid motions on August 9, 1983. For the reasons set forth in the court's oral decision, a copy of which is attached hereto and by this reference incorporated herein, it is hereby

Ordered, Adjudged and Decreed as follows:

1. In compliance with the mandate of the Washington Supreme Court, the defendants which are Washington public utility districts or Washington municipalities lacked authority to enter into said Agreement and as to them the Agreement is *ultra vires*, void *ab initio*, invalid, ineffective and unenforceable;

2. Inasmuch as the Participants' Agreement is *ultra vires*, void *ab initio*, invalid, ineffective and unenforceable as to the defendants which are Washington public utility districts or Washington municipalities, and by reason thereof, the Participants' Agreement is also ineffective and unenforceable as to all other moving defendants and all participant defendants, on the grounds of (a) contract indivisibility and failure of the condition of substantially 100% participation, (b) mutual mistake as to the authority of Washington public utility districts and municipalities to enter into the Agreement, and (c) frustration of purpose and impracticability.

3. For the aforesaid reasons, none of the moving defendants or any other participant defendant is obligated, under or by virtue of the Participants' Agreement or WPPSS Board of Directors Resolution No. 890, as amended (the "Bond Resolution"), to make any payment to WPPSS, or to any other defendant, or to Chemical or any

purchaser or holder of bonds issued by WPPSS in connection with the Projects;

4. The defenses, arguments, objections and contentions raised by Chemical and WPPSS in opposition to the aforesaid motions for summary judgment or entry of judgment, including but not limited to any defenses, arguments, objections or contentions relating to estoppel, waiver, laches, ratification, restitution, unjust enrichment, Article 8 of the Uniform Commercial Code or alleged control by participants of affairs relating to the Projects, are hereby rejected and overruled for the reasons stated in the court's oral opinion;

5. Chemical's complaint for declaratory relief is dismissed, with prejudice, and the moving defendants are to be awarded their taxable costs against Chemical and WPPSS; and

6. There is no just reason for delay in entering this Order And Judgment, which is hereby expressly directed to be entered pursuant to CR 54(b).

DONE IN OPEN COURT this 11th day of August, 1983.

By: /s/ H. Joseph Coleman

H. Joseph Coleman
Judge of the Superior Court

Presented by:
HELSELL, FETTERMAN, MARTIN,
TODD & HOKANSON

By: /s/ David F. Jurca

David F. Jurca
Attorneys for Columbia Defendants

Approved as to form:
BETTS, PATTERSON & MINES

By: /s/ Michael Mines

Michael Mines
Attorneys for Chemical Bank

GORDON, THOMAS,
HONEYWELL, MALANCA,
PETERSON & O'HERN

By: /s/ Albert R. Malanca

Albert R. Malanca
Attorneys for Washington Public
Utility Group

EXHIBIT A

Columbia Defendants:

Columbia Rural Electric Association, Inc.
Blachly-Lane County Cooperative Electric Assoc.
Central Electric Cooperative, Inc.
Columbia Basin Electric Cooperative, Inc.
Consumers Power, Inc.
Coos-Curry Electric Cooperative, Inc.
Douglas Electric Cooperative, Inc.
Hood River Electric Cooperative
Lane Electric Cooperative, Inc.
Midstate Electric Cooperative, Inc.
Salem Electric
Umatilla Electric Cooperative Association
Wasco Electric Cooperative, Inc.
Kootenai Electric Cooperative, Inc.
Fall River Rural Electric Cooperative, Inc.
Lost River Electric Cooperative, Inc.
Raft River Rural Electric Cooperative, Inc.

21 Defendants:

City of Bandon
City of Bonners Ferry
City of Burley
Clearwater Power Company
Elmhurst Mutual Power & Light
Glacier Electric Cooperative
City of Heyburn
Idaho County Light & Power
City of Idaho Falls
Northern Lights, Inc.
Ohop Mutual Light
Okanogan County Electric Cooperative
Parkland Light & Water Co.
Prairie Power Cooperative
City of Rupert

Rural Electric Association
Unity Light & Power
Wells Rural Electric
City of Centralia, Washington
City of Port Angeles, Washington
Town of McCleary, Washington

9 Defendants:

Big Bend Electric Cooperative, Inc.
City of Milton-Freewater, Oregon
Lincoln Electric Cooperative, Inc.
Missoula Electric Cooperative, Inc.
Ravalli County Electric Cooperative, Inc.
Salmon River Electric Cooperative, Inc.
Tanner Electric Cooperative
Vera Irrigation District No. 15
Vigilante Electric Cooperative, Inc.

Oregon PUDs:

Central Lincoln People's Utility District
Clatskanie People's Utility District
Northern Wasco County People's Utility District
Tillamook People's Utility District

Washingtion Public Utilities Group:

Public Utility District No. 1 of Benton County
Public Utility District No. 1 of Clark County
Public Utility District No. 1 of Cowlitz County
Public Utility District No. 1 of Grays Harbor Co.
Public Utility District No. 1 of Lewis County
Public Utility District No. 1 of Mason County
Public Utility District No. 3 of Mason County
Public Utility District No. 1 of Okanogan County
Public Utility District No. 2 of Pacific County
Public Utility District No. 1 of Skamania County
City of Tacoma, Washington

Others:

Benton Rural Electric Association
City of Springfield
City of McMinnville
Lower Valley Power & Light, Inc.
City of Canby, Oregon (Canby Electric Board)
City of Cascade Locks, Oregon
City of Drain, Oregon
Orcas Power and Light Company
Alder Mutual Light Company
Nespelem Valley Electric Cooperative, Inc.
Town of Steilacoom, Washington
Public Utility District No. 1 of Franklin County
City of Blaine, Washington
Public Utility District No. 1 of Klickitat County
City of Sumas, Washington
Public Utility District No. 1 of Clallam County
City of Ellensburg, Washington
Public Utility District No. 1 of Wahkiakum County
Public Utility District No. 1 of Pend Oreille County
City of Richland, Washington
Public Utility District No. 1 of Chelan County
Public Utility District No. 2 of Grant County
Public Utility District No. 1 of Snohomish County
Public Utility District No. 1 of Douglas County
Inland Power & Light Company

No. 83-1619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEMICAL BANK AND
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioners,

v.

GARY ASSON, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTION PRESENTED

Did the Supreme Court of Idaho, in its decision reaffirming its long and consistently applied construction of the Idaho Constitution, holding that, absent an election, the respondent Idaho Cities lack authority to enter into the Participants Agreements for Washington Public Power Supply System Nuclear Projects 4 and 5, violate the United States Constitution by effecting a taking of or impairment of bondholders' property rights or an impairment of bondholders' contracts?

PARTIES TO THE PROCEEDING

The parties to the proceedings set forth at page i of the Petition for Certiorari correctly set forth the parties in this case. This Brief in Opposition to Petition for Certiorari is offered by the Respondents who were original petitioners before the Supreme Court of Idaho: Gary Asson, LeRae Asson, Ransom H. Brown, Betty Brown, J. R. Simplot Company, Richard H. Bohle, Paula L. Bohle, Blaine Jensen, Lillian D. Jensen, Clarence F. Bellem, Lillian B. Bellem, Magic Valley Foods, Inc., and Cameron Sales, Inc. The remaining respondents excepting for the City of Heyburn, Idaho, and its officials, join in this Brief in Opposition to Petition for Certiorari and the counsel for those municipal parties specifically join in this brief. They are set forth in Appendix B.

A list of the subsidiaries (other than wholly owned) or other affiliates of J. R. Simplot Company called for by Rule 28.1 attached as Appendix D. The other corporate respondents have no affiliates.

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TABLE OF AUTHORITIES

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents, Petitioners before the Supreme Court of the State of Idaho, respectfully pray that this Court deny this Petition for Writ of Certiorari.

OPINION BELOW

The statement of proceedings below found at page 2 of the Petition for Certiorari is essentially correct.

JURISDICTION

These Respondents respectfully disagree with the statement of jurisdiction contained at page 2 of the Petition for Certiorari for the reason that it incorrectly states a jurisdictional basis. In the jurisdictional statement, and throughout the Petition for Certiorari, Petitioners have sought to frame this matter as if the Idaho municipal

respondents took actions, other than merely participating in the Idaho litigation, which may have interfered with the "constitutional rights of bondholders" purported to be represented by Chemical Bank as Trustee. An examination of the decision of the Idaho Supreme Court which is annexed to the Petition for Certiorari as Appendix A and which is reported at 670 P.2d 839 reveals that the Idaho Court simply construed its constitutional provision as it applied to the facts before it, which facts were presented by stipulation. Moreover, this case was brought below not by the Idaho municipal respondents, but by individual and corporate ratepayers of three of the Idaho municipal respondents who, as private parties, could not have taken in action which could be described as "state action" in a form which might have impaired or interfered with bondholders' constitutional rights. Similarly, Petitioners have asserted in their jurisdictional statement and elsewhere in their Petition that the decision of the Idaho Supreme Court was "the surprising result" which was "coupled with the sweeping breath of the relief granted" in an effort to, by ipse dixit, elevate the Idaho Court's essentially limited ruling on a state constitutional issue to the dignity of a matter which might fall within the certiorari jurisdiction of this Court. As will be explained below, the result of the Idaho Supreme Court was neither surprising nor sweeping and the relief granted was the only relief reasonably foreseeable under the long line of consistently applied Idaho State cases construing its constitution. That consistent application of Idaho constitutional law does not rise to the dignity of an impairment of federal constitutional right. There is no substantial federal issue within the jurisdiction of this Court.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statement contained at page 2 of the Petition for Certiorari is correct.

STATEMENT OF THE CASE

The statement of the case contained in the Petition for Certiorari at pages 3-8 does not accurately reflect the proceedings in the Idaho Supreme Court which are more correctly summarized by that Court in its Opinion. This case does not arise out of a municipal bond default. This case arises out of a petition for writ of prohibition brought by the individual and corporate ratepayer petitioners below who sought relief from a charge for electrical service imposed or threatened to be imposed by Idaho cities for the purpose of discharging obligations of those cities which were violative of Article 8, § 3 (and other provisions) of the Idaho Constitution. Although other litigation respecting the interpretation and effect of those obligations, if any, was then pending before the courts of the State of Washington involving those Idaho municipalities, these ratepayers were not and are not parties to the Washington cases. Moreover, the litigation in the courts of the State of Washington specifically deferred to the Idaho court for a determination of the question of the constitutional authority of the Idaho cities to enter into the participants' agreement obligations. The question of Idaho constitutional authority was, in short, not a part of the Washington litigation. The petitioning parties below were not parties in the Washington courts. The wide range of issues which may be litigated in the Washington courts were also not before the Idaho Supreme Court in this case. This case purported only to decide the single Idaho constitutional issue. Thus, in no way, can this case

be described as "ancillary to the principal litigation" pending in the courts of the state of Washington.

Petitioners' statement of the case goes dramatically far beyond the record presented to the Idaho Supreme Court in this case. That record was presented to the Idaho Supreme Court by way of a "Statement of Stipulated Facts."[1] The actual record before the Idaho Supreme Court is accurately and correctly summarized by the Idaho Supreme Court in its Opinion directing that its alternative writ of prohibitin be made permanent. That record is again briefly summarized here.

Among numerous public power suppliers in the Northwest who are customers of the United States Department of Interior, acting through the Bonneville Power Administration (BPA), are five small Idaho cities, Burley, Heyburn, Rupert, Idaho Falls, and Bonners Ferry (the municipal respondents here). Throughout the time relevant to the decision of the Idaho Supreme Court, and at least since 1963, each of those cities purchased power from the BPA and resold it to customers, including the petitioner ratepayers. By Idaho law, those cities are the only supply of electrical power for those ratepayers and their rates are not regulated by the Idaho Public Utilities Commission but solely by the municipal governments involved.

As the Idaho municipalities and other suppliers of public power in the Northwest entered the 1970's, they were advised by various analysts of future regional power sup-

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[1] The Stipulated Statement without its attachments and without independent additional statements of all parties and objections to those statements is included as Appendix A to this brief. The full record is appended to Respondents' Brief in Opposition to Petitioners' Motion to Defer.

plies that a shortage was coming, an opinion shared throughout Northwest public power circles. In 1973 the BPA alerted its customers, including the Idaho cities, that a "notice of insufficiency" would have to be issued if an adequate plan were not formulated to meet the then projected power needs. In June of 1976, after some deferral, that notice was finally issued to all BPA preference customers, including the five Idaho cities. The BPA's letter to the Idaho cities put them on notice that they risked a loss of firm energy supply and that, beginning in 1983, the BPA might place each such customer on an allocation system. Most Idaho Cities have no generating facilities of their own.

During the early 1970's, the Petitioner, Washington Public Power Supply System ("Supply System"), entered into net billing participation agreements for three nuclear projects to be built by it, Washington Public Power Supply System Projects 1, 2, and 3. Under these net billing arrangements, the BPA effectively stood behind the financing. With the BPA support for the net billing agreements, the authority of participants to enter into these agreements was upheld by the United States District Court for the District of Oregon because the participants did not bear a "dry hole" risk of incompletion. The Idaho cities entered into agreements for each of these projects. No elections were held in the Idaho cities with respect to those projects. But, as the Idaho Supreme Court has pointed out, these net billing arrangements were authorized by Idaho statutory law and they were substantially different from the "dry hole" risk imposed by the participants agreements for Projects 4 and 5.

In 1973 a United States Treasury Department ruling denied tax exempt status for bonds to finance additional thermal electrical generating plants if the projects were

supported by BPA participation in the manner of the first three projects. Thus, in 1975 and 1976 as the decision was made to proceed with the Supply System's Projects 4 and 5, a different form of participation, one not backed by the BPA, was required of the cities if they wished to have a share of electricity to be generated by those projects. The vehicle for providing project generation capacity to participants where the Participants' Agreements entered into in July of 1976 for Supply System Nuclear Projects 4 and 5. Under these Participants' Agreements the Idaho municipalities and 83 other publicly owned utilities in six Northwestern states agreed to purchase "participants' shares" of "project capability" in those projects. For the first time, however, their undertaking to purchase participants' shares was not supported by the obligation of the BPA which had been the significant factor in the net billing arrangements for Projects 1, 2, and 3.

The cities did enter into the Participants' Agreements and provided opinions of counsel stating that the cities had authority to enter into those agreements. The cities did so by duly passed resolutions, but, despite the clear requirements of Article 8, § 3, of the Idaho Constitution, did not undertake to have any election in which their qualified voters could pass on the obligation being so undertaken.[2] The obligations incurred by the cities under

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[2] Although opinions of Idaho municipal counsel were given to the Supply System, Supply System's lead bond counsel in New York specifically excepted the Idaho cities and certain other participants from its opinion on the question of participants' authority. There is no explanation in the record in this case of why bond counsel refused to give an opinion on the authority of the Idaho cities, but we note that action was consistent with the decision of the Idaho Supreme Court sought to be reviewed here.

the Participants' Agreements included the obligation stated in Section 6(d) of those Agreements which has been interpreted by the Petitioners as requiring each participant unconditionally to pay to the Supply System that participant's share of the total annual cost of Projects 4 and 5, including debt service on the bonds issued by the Supply System, whether the Projects are operable or operating and notwithstanding the termination of the Projects prior to completion. This obligation was characterized variously as the "dry hole risk" or in the terms of the Idaho Supreme Court, the "hell or high water" clause. In other words, for purposes of the record here, Section 6(d) of the Participants' Agreements required that the cities unconditionally obligate themselves for their percentage share of the entire cost of financing for projects which might never produce electricity and which might, as in fact did happen, be terminated eighty percent short of completion. It was stiplated that the liability of the cities under the Agreements as so interpreted, exceeded in the annual budget for each and very city, in the year the cities entered into the Agreements, 1976. None of the cities conducted an election nor did they make provisions for an annual tax or sinking fund to pay for the principal amount of the obligations sought to be imposed on them by Section 6(d) of the Participants' Agreements. Each of these factors are elements of the limitation on municipal authority in Article VIII, § 3, of the Idaho Constitution.

Subsequently the Projects overran their projected costs and have been terminated. Unfortunately, that termination was not effected prior to sales of bonds. Under the terms of the Participants' Agreements the cities obtained no title in Projects 4 and 5, either directly or indirectly, legally or beneficially. Obviously, no electric-

ity will be generated from those projects for resale by the cities to the respondent ratepayers.[3]

The removal of the Idaho cities from the total of the 88 participants reduced by less than two percent of the participants' obligations are left untouched by the decision of the Idaho Supreme Court which is sought to be reviewed here. The rural electrification cooperatives who are also Idaho participants among the remaining eighty-three public participants in Projects 4 and 5 are unaffected by this decision. The "step-up" provisions in the Participants' Agreements for Projects 4 and 5 more than adequately responded to the possibility of losing a small percentage of obligated participants in order to insure that the Participant's Agreements obligations would still fund the projects.

The ratepayer respondents (petitioners below) brought an original action for writ of prohibition in the Idaho Supreme Court asking that Court to enforce the plain and consistently applied language of several provisions of the Idaho Constitution which denied these cities authority to enter into obligations of the sort imposed by Section 6(d) of the Participants' Agreements. The Idaho Supreme Court determined that Article 8, § 3 of the Idaho Constitution cleary precluded authority in the Idaho cities in these instances. The Court did not look at the other provisions of the Idaho Constitution. Specifically the Idaho Court held that an election was required to undertake long term obligations and that, in the absence of an election, there was no authority for the obligations and for charging Respondents to discharge those liabilities.

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[3] Of Projects 1, 2, and 3, only 2 is now operating, while 1 and 3 have been mothballed.

That is the entire case now before this Court on this Petition for Certiorari. It is not a case which is ancilliary or in some fashion subordinate to the Washington case. It involves different parties and different issues. The factual issues were specifically limited by the stipulation of the parties presenting a record to the Idaho Supreme Court. It was upon that stipulated record that the Idaho Court based its local law decision. Finally, as will be described below, the holding of the Supreme Court of Idaho was in no fashion "surprising" or "unanticipated." The decision of the Supreme Court of Idaho did not cause the Supply System's bond default. The decision involved too small a percentage of the total Participants' Agreement obligations and turned on the unique but consistently applied provision of Idaho constitutional law not applicable to over 98% of the total Project 4 and 5 participants.

REASONS FOR DENYING THE WRIT

There are basically two reasons urged upon this Court by Petitioners for granting their Petition. The first is that this case involves the "nation's largest municipal bond default." That is simply not the case. This case involves a specific provision of Idaho constitutional law as it has been specifically interpreted and reinterpreted throughout this century by the Idaho Supreme Court. The total impact on Supply System Projects 4 and 5 bonds is, as described above, less than 2%. It is only by a firm tugging on their bootstraps that Petitioners' efforts to make this limited case in Idaho a part of Petitioners' broader litigation in other states that they can seek to make this local law issue rise to the dignity of matters appropriate for this Court's certiorari jurisdiction.

The other reason consistently urged and consistently wrong is that, somehow, the Idaho Supreme Court's decision was "a surprising change in local law" with the fur-

ther implication, supported nowhere in the Petition nor in the record in this case, that the Supreme Court of Idaho manipulated its line of constitutional authority so as to create a detriment to Petitioners which could never have been foreseen. That assertion is not supported by the decision of the Idaho Supreme Court which is set out in Appendix A to the Petition nor in any review of the actual decisions on this issue of Idaho local law. Indeed, as will be described below, there is nothing surprising at all about the Idaho Court's continuing to treat its constitution in a predictable, sensible, and coherent way including that treatment contained in its decision.

1. The Supreme Court Of Idaho's Decision In This Case Did Not Effect A Retroactive Change In The Law.

By ipse dixit Petitioners have repeatedly asserted in their Petition for Certiorari that the Supreme Court of Idaho dramatically amended the Idaho constitutional law on municipal authority and debt limitation so as to serve the Idaho cities' purpose to impair the property rights of bondholders and Supply System. Nothing could be further from accurate. First, the purpose and result of the action below was to relieve ratepayers of an unconstitutional charge. Second, the operative provision of the Idaho Constitution governing the authority of Idaho cities to enter into long term debt obligations of the sort contained in Section 6(d) of the Participants' Agreements for Projects 4 and 5 is contained in Article 8, § 3 of the Idaho Constitution which is set out in its entirety in Appendix C to this Brief.

Article 8, § 3 of the Idaho Constitution declares that no city "shall incur any indebtedness or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without

the assent of two-thirds (2/3) of the qualified electors thereof" nor without creating provision for the collection of an annual tax sufficient to pay the interest on such indeptedness and a sinking fund to discharge the principal of that obligation. It then states "any indebtedness or liability incurred contrary to this provision shall be void. There follows a proviso that permits cities to incur "ordinary and necesary expenses authorized by the general laws of the state. . . ." Thereafter are a series of other exceptions for revenue bond public works projects, each of which are specifically set out. The only such exception relating to electrical facilities is an allowance for obligations incurred to "rehabilitate existing electrical generating facilities." That exception still requires an election in which a majority of qualified electors approves the obligation. No exception is contained in Article 8, § 3 for obligations incurred with the construction of or development of new electrical generation capacity or facilities.

Article 8, § 3 was part of the Idaho constitution as it was originally adopted in 1889, and the operative language which controls this case has remained substantially unchanged since that time.

In 1912 The Idaho Supreme Court was requested to construe this provision liberally to allow cities to incur such an obligation without an election. *Feil* v. *City of Coeur d'Alene*, 23 Idaho 32, 129 P. 643 (1912). In that case the city was purchasing a municipal water system, financing its purchase with revenue bonds, to be repaid out of a fund composed of revenues derived from the operation of the waterworks. It was argued that, because there was no direct tax revenue or general fund obligation contracted by the city, Article 8, § 3 should be held not to apply. The Idaho Supreme Court in *Feil* rejected that argument and held that it would give effect to th plain

language of Idaho's constitutional provision which barred the incurring of "any indeptedness, or liability, in any manner, or for any purpose. . . ." Rejecting "subtleties and refinements of reasoning" the Court held that the incurring of a liability, no matter how the obligation would be repaid, and held against municipal authority.

In 1914 the Idaho court was requested to reexamine *Feil* and refused in *Boise Development Co. Ltd.* v. *Boise City*, 26 Idaho 347, 143 P. 531 (1941). Subsequently the Idaho court was repeatedly offered opportunities to change its construction of the Idaho constitutional limitation on municipal obligations, and in each instance, although it recognized that Idaho's rule was stricter than the majority rule, refused those opportunities. *Miller* v. *City of Buhl*, 48 Idaho 668, 284 P. 843 (1930); *Williams* v. *City of Emmett*, 51 Idaho 500, 6 P.2d 475 (1931); *Straughan* v. *City of Coeur d'Alene*, 53 Idaho 494, 24 P.2d 321 (1932).

In subsequent cases the Idaho court has consistently reaffirmed the continued vitality of the *Feil* case. *See, e.g., Village of Moyie Springs* v. *Aurora Manufacturing Co.*, 82 Idaho 337, 353 P.2d 767 (1960); *Hansen* v. *City of Idaho Falls*, 92 Idaho 512, 446 P.2d 634 (1968); *Idaho Water Resource Board* v. *Kramer*, 97 Idaho 535, 548 P.2d 35 (1976). In its decision below the Idaho Supreme Court has again reexamined the history and law relating to Article 8, § 3 at length, and confirmed its adherence to its consistent, 70-year-old line of authority in reaching the decision of which Petitioners now complain.

Petitioners also assert, based on the equally unsupported statements of the dissenting justice in the Idaho Supreme Court, that an unexpected retroactive decision was made by the Idaho Supreme Court concerning the proviso relating to ordinary and necessary expenses in

Article 8, § 3. The majority of the Court carefully examined that issue and anlayzed all of its consistently applied prior cases. The dissenting justice relies on but a single authority. An examination of the majority's opinion in the decision of the Idaho Supreme Court reveals that, once again, it was applying a carefully reasoned and long-standing line of authority and that the bald assertion of an unexpected retroactive change in the law is unsupported. In any event, it is difficult to imagine a circumstance in which very large, open-ended, "deep hole" indebtedness incurred for the construction of large nuclear power plants could be stretched to fall within an ordinary meaning of "ordinary" or "necessary" expenses for these five small cities. Moreover, the proviso specifically states that those "ordinary and necessary expenses" must be provided for in the general laws of the State of Idaho if the exception is to apply. There is no Idaho statutory law authorizing Idaho cities to incur liability (1) without election, (2) of large proportion, or (3) for the construction of plants in which they have no legal or beneficial title. In short, as the Idaho Supreme Court correctly interpreted its local law, the "ordinary and necessary expense" proviso is absolutely inapplicable to this case.

2. No Federal Constitutional Right Or Immunity Has Been Impaired By The Decision Of The Idaho Supreme Court.

Petitioners, at pages 9-13 of the Petition for Certiorari assert on behalf of bondholders a federal constitutional protection for their expectation that the Participants' Agreements of the five small Idaho municipalities would be enforced in violation of the Idaho Constitution. They reach this conclusion by combining the Fifth and Fourteenth Amendments to the United States Constitution with Article I, Secton 10, Clause 1, the Contract Clause of

the Constitution. Unfortunately, they cite no authority for the existence of such an overwhelming federal constitutional right.

There are essentially three lines of authority relied upon by Petitioners for this proposition. The first is general authority under the prohibition on impairment of contract found in Article I, Section 10, Clause 1 of the United States Constitution. The second is instances where the courts of the states have manipulated their interpretive law so as to change that law abruptly and unexpectedly to impede reasonably created expectations based upon prior decisions. Finally, they rely upon general propositions announced as a part of more particular holdings of this Court in elaborating upon general principles supporting specific rulings.

The law relating to the prohibition on impairment of contract is well established and clearly does not apply in this case The contracts clause does not apply to the development of the law through judicial pronouncement but only applies to legislation (including constitutional enactment) enacted by a state subsequent to the creation of contract. *E.g.*, *Barrows* v. *Jackson*, 346 U.S. 249 (1953); *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (1924). This line of authority is, in turn, based upon two important policy determinations of this Court. The first of these is that the courts of the several states must be allowed to develop their law through the ordinary process of case-by-case reasoned elaboration of principle decision. In other words, the ability of the courts in the several states of our federal system to continue to interpret and develop the local law must be respected and preserved. *E.g.*, *Hawks* v. *Hamill*, 288 U.S. 56 (1933). The second of these policy considerations is that this Court will defer to the local law determinations of the several states concerning what that

law is and has been. *E.g.*, *Hawks* v. *Hamill*, *supra*; *Long Sault Development Co.* v. *Call*, 242 U.S. 272 (1916); *Zane* v. *Hamilton County*, 189 U.S. 370 (1903).

In the present case the constitutional limitation on municipal authority raised by the ratepayer respondents below and determined by the Idaho Supreme Court was created in the Nineteenth Century and has been consistently interpreted and applied by the Idaho courts for a period in excess of 70 years. There is no legislative or constitutional enactment which has been interposed between the date of the contracts in this case in 1976 and the date of the Court's decisin in 1983. Under the circumstances of this case there can be no unconstitutional impairment of contract rights. *Hawks* v. *Hamill*, *supra*; *Long Sault Development Co.* v. *Call*, *supra*; *Ennis Waterworks* v. *City of Ennis*, 233 U.S. 652 (1914); *Zane* v. *Hamilton*, *supra*.

The second line of authority relied upon by Petitioners is found in those cases which hold that courts may not manipulate in an abrupt and unforeseeable fashion changes in their interpretation of the local law so as to effect deprivation of property. *See*, *e.g.*, *Hughes* v. *State of Washington*, 389 U.S. 290 (1967). This Court has been reluctant to so hold (absent impingements on fundamental liberties) for many of the same reasons that this Court does not apply the contracts clause to judicial action. *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 85-87 (1980); *Demorest* v. *City Bank Farmers Trust Co.*, 321 U.S. 36, 42, 49 (1944); *Broad River Power Co.* v. *South Carolina*, 281 U.S. 537, 540 (1930). Essentially, this court has refused to interject itself into questions of the interpretation of local law or the reconciliation of the cases within a state or among the several states interpreting state law, even though the petitioners in those several

instances have asserted that the state courts had changed the law so as to upset the reasonable anticipation upon which they had acted. The result has not differed whether the claimed constitutional impairment was raised under the contracts clause or under the Fifth and Fourteenth amendments.

The third line of authority relied upon by Petitioners is best exemplified by *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979) and *Armstrong* v. *United States*, 364 U.S. 40 (1960). Both of these cases were decisions relating to the "takings" clause of the Fifth Amendment of the United States Constitution. Both of them involve very specific actions of the United States Government which directly interfered with known, traditional property rights established under local law. The *Kaiser Aetna* case also involved inconsistent federal administrative actions. In the present case no such property right has been raised in the Petition for Certiorari. Similarly, no state action was taken by either these ratepayers or the Idaho Supreme Court beyond the simple enforcement of the well-known and long-established Idaho Constitutional limitation on municipal debt authority. Certainly no prior action was taken by these ratepayers, the Idaho courts, or the state government of the State of Idaho establishing a specific property right in either the Petitioners or the bondholders they presume to represent. There having been no such prior positive action, there was no reasonable expectancy which a subsequent action could have upset. The general language contained in those cases is particularly unilluminating concerning the existence of a protectable federal constitutional right.

3. There Is No Substantial Federal Question Raised By These Petitioners.

As rule 17.1 of the Rules of this Court makes clear, this Court's review on writ of certiorari is not a matter of right, but is discretionary, and will be granted "only when there are special and important reasons therefore." We have gone to greater than ordinary length to indicate what the actual record in this case is and how that record and the decision of the Idaho court fits within established principles of federal constitutional application. Our purpose was to show that there is no substantial federal question of great public interest at stake here.

This case did not and does not involve the largest municipal bond default in our nation's history. It involves the Idaho State constitutional authority governing Idaho cities' incurring debt or liabilities without an election or the other safeguards required by the Idaho Constitution. It involves less than two percent of the total obligations for the Supply System's Nuclear Projects 4 and 5. It does not involve state legislative or constitutional action interposed to destroy contract or established property rights between 1976 and 1983. It does not involve a retroactive, surprising, unprecedented change in the law of Idaho. It involves the Idaho Supreme Court's continued adherence to its 70-year-old interpretation of the plain language of its own local constitution, a constitution and an interpretation which it has repeatedly recognized to be unique among similar provisions of other states and which it has also refused to change. It does not involve municipal action depriving any party of property or a contract right, but instead is a traditional action brought by affected parties, here ratepayers of the five small Idaho cities, seeking redress in the Idaho state courts for an Idaho constitutional violation. It is not a case involving

the wide-ranging editorial description of the entire Washington Public Power Supply System debacle (which we presume must have been elaborated in the other litigation involving Petitioners), but is, instead, one based solely upon a limited stipulated record dealing with the specific Idaho local law issues and parties before the Idaho court.

Petitioners have characterized the constitutional issues as a derivative from three separate Constitutional provisions in order to obscure the fact that there is, in fact, no recognized federal constitutional issue presented in this case. They have done so in order that they might have one further court pass upon the local law question which they failed to win in the Idaho Supreme Court, the court having responsibility for Idaho constitutional interpretation. Similarly, Petitioners have inaccurately characterized the decision of the Idaho Supreme Court as surprising, unanticipated, and as upsetting reasonable expectations when an examination of the local law repeals, as the Idaho Supreme Court states, the contrary is the fact.

This Court does not sit to correct errors of the state courts in the interpretation of state law. *Mangum Import Co.* v. *Coty*, 262 U.S. 159, 163 (1923); *Sauer* v. *City of New York*, 206 U.S. 536 (1907). Nor is it the function of the certiorari jurisdiction of this Court to retry or reinterpret the facts presented below. *Graver Tank & Manufacturing Company* v. *Linde Air Products Company*, 336 U.S. 271 (1949). Instead, this Court has reserved its discretionary jurisdiction for issues which are of great public importance, "beyond academic or episodic" interests, and in which the constitutional issues have been clearly drawn in the courts below. *Estelle* v. *Gamble*, 429 U.S. 97, 115 (1977) (Stevens, J., dissenting); *Rice* v. *Sioux City Cemetery*, 349 U.S. 70 (1954).

This case is episodic, it is of limited scope, and it turns completely on an interpretation of local, Idaho constitutional law. It is the least appropriate of cases for this Court's review on a petition for certiorari.

CONCLUSION

For all of the reasons set forth hereinabove the Petition for Certiorari of Chemical Bank and the Washington Public Power Supply System should be denied.

RESPECTFULLY SUMBITTED this ____ day of June, 1984.

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court No. 14719
Supreme Court No. 14809

GARY ASSON and LERAE ASSON,
husband and wife, *et al.*,
Petitioners,

v.

CITY OF BURLEY, *et al.*,
The INTERSTATE COMMERCE COMMISSION,
Respondents.

and

WASHINGTON PUBLIC POWER SUPPLY SYSTEM; *et al.*,
Intervenors.

RICHARD H. BOHLE and PAULA BOHLE,
husband and wife, *et al.*,
Petitioners,

v.

CITY OF RUPERT, *et al.*,
Respondents.

and

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,
Intervenors.

STATEMENT OF STIPULATED FACTS

The parties stipulate to the truth of the statements set forth below for the purposes of this litigation only. The parties do not necessarily concur that the statements are relevant to these consolidated cases, and all objections as to relevancy are reserved.

1. This action concerns the authority under Idaho law of the five Idaho cities referred to herein to enter into Participants' Agreements with respect to two electric generating projects (Projects 4 and 5) of the Washington Public Power Supply System ("Supply System").

THE PARTIES

2. Chemical Bank, a New York corporation, is trustee for the holders of bonds issued by the Washington Public Power Supply System (the "Supply System") to finance the construction of Projects 4 and 5. Chemical was appointed trustee in February of 1977 pursuant to Bond Resolution No. 890 of the Board of Directors of the Supply System (a copy of the Resolution is attached to Chemical Bank's Petition for Leave to Intervene, dated December 10, 1982).

3. The bondholders whom Chemical Bank represents include numerous individuals and institutions.

4. The Supply System is a municipal corporation and joint operating agency organized under the laws of the State of Washington to finance, construct, own and operate electrical generating facilities. It was established in 1957 and is composed of 19 public utility districts in the State of Washington and the cities of Seattle, Tacoma, Richland and Ellensburg, Washington.

5. The cities of Burley, Heyburn, Rupert, Bonners Ferry and Idaho Falls, Idaho ("the Cities"), are municipal corporations organized under the laws of Idaho. Each city is governed by a Mayor and City Council.

6. J. R. Simplot Company is a Nevada corporation that owns and oprates a potato-processing facility outside the city limits of the City of Heyburn and a waste treatment facility within the city limits of the City of Burley. J. R. Simplot Company is the single largest user of electricity of Heyburn and is one of the largest users of electricity in Burley. Magic Valley Foods, Inc., is an Idaho corporation having its principal place of business at Rupert. It purchases electrical energy from Rupert to operate a potato processing plant. Cameron Sales, Inc. is an Idaho corporation having its principal place of business in Rupert and purchases electrical energy from Rupert in the operation of its farm implement dealership.

7. The following individuals and corporations purchase electric power from the cities of Burley, Heyburn and Rupert: Gary Asson and LeRae Asson, from Burley; Ransom H. Brown and Betty Brown, from Heyburn; Richard H. Bohlle, Paula L. Bohle, Blaine Jensen, Lillian D. Jensen, Charles B. Park, Billy F. Park, Clarence F. Bellem, Lillian B. Bellem, Magic Valley Foods, Inc., and Cameron Sales, Inc. from Rupert.

8. Petitioners in these consolidated cases include qualified electors of and purchasers of electrical energy delivered by the cities of Burley, Rupert and Heyburn. Some Petitioners are purchasers of electrical energy delivered by these cities, but are not citizens or qualified electors of their respective city.

THE CITIES' ELECTRICAL DISTRIBUTION SYSTEMS

9. Each of the Cities owns and operates an electrical distribution system that supplies electrical power to that city's inhabitants and nearby areas.

10. The electrical distribution systems of Burley, Rupert and Heyburn do not include facilities for the generation of electrical power and, consequently, those cities purchase power from another suppliler to meet the power needs of their respective electric customers. Idaho Falls and Bonners Ferry

own generating facilities which provide part of their electric supplies, but these cities purchase power from another supplier in order to meet the needs of their electric customers.

11. Petitioners' only supplier of electrical energy is their respective city if the city is willing and able to provide adequate electric service because of the Electrical Supplier Stablization Act, Idaho Code § 61-332 *et seq.*

12. For amny years, and at least since August 1963, the Cities have purchased electrical energy from the United State Department of Interior acting through the Bonneville Poweer Administration (hereinafter "BPA"). Over 100 public utilities in the Northwest—known as BPA preference customers—have similarly purchased electricity from the BPA.

13. BPA was created in 1937 under the Bonneville Project Act to market power to be produced by the Bonneville Dam located on the Columbia River. By 1976, BPA's marketing authority encompassed 29 other hydroelectric facilities in the Columbia Basin. BPA has not constructed any of the hydroelectric facilities from which it markets electric energy.

14. Through the 1950s the Pacific Northwest's electric power was chiefly supplied by hydropower, most of which was marketed by BPA.

15. Under federal law, public bodies, such as the Cities, were entitled to certain preferential treatment in the purchase of electric power from BPA, 16 U.S.C.A. § 832d(a).

16. Electric power has been supplied to the Cities pursuant to the terms of a "Power Sales Contract" between the respective Cities and the United States, acting through the BPA, at least since 1963. Representative copies of the Power Sales Contract of the Cities are on file with the pleadings in the consolidated cases.

17. As a result of forecasts made in the late 1950's and early 1960's, a growing concern developed in the Pacific Northwest that the region's hydroelectric resources could not keep pace with expected demands for power.

18. In 1966, continuing forecasts of electrical energy demand exceeding the capability of the region's hydro-power system caused many public and private utilities and the BPA to form an ad hoc group known as the Joint Power Planning Council ("JPPC"). The purpose of the JPPC was to study the region's future needs and to prepare to meet them. Idaho Falls and possibly other Idaho cities were members of the JPPC. The JPPC determined that the future would require the development of thermal generating facilities to meet anticipated demands because hydro resources would be inadequate.

19. The result of the JPPC's work was the "Hydro-Thermal Power Program," a plan calling for the construction of thermal power plants of the benefit of the Pacific Northwest's public owned utilities. The Hydro-Thermal Power Program was approved by Congress in the Public Appropriations Works Acts of 1970.

20. The Public Powr Council ("PPC") was formed in 1968. The Cities have paid dues to the PPC since at least 1972.

21. Between 1968-1976, representatives of Idaho Falls and possibly other Idaho cities served on the PPC's Executive Committee, as well as on other important committees.

22. Between 1968 and 1976, after investigating reasonable methods of constructing additional power plants and obtaining more power, the PPC requested the Supply System to arrange for the financing, design and construction of five nuclear plants in the Hydro-Thermal Program. Those plants came to be known as Washington Nuclear Projects 1, 2, 3, 4 and 5.

23. The view that the egion's hydro-power resources would be insufficient in the future was shared by the following, among others, during the period 1968-1976:

(a) By the Cities themselves and other public owned utilities, as reflected in all of the agreements signed by the Cities with reference to Projects 1, 2, 3, 4 and 5.

(b) By the Pacific Northwest Utilities Conference Committee ("PNUCC"). Formed in 1946, the PNUCC was a

region-wide planning organization, in which 130 public and private Northwest utilities were represented. Each year it published the *West Group Forecast*, a compilation of load growth forecasts from each of the utilities in the region. The *West Group Forecast* was used over the years since the establishment of the PNUCC in 1946. Those forecasts predicted power shortages by the early to mid-1980's.

(c) By the United States Government, which (through the Secretary of the Interior) advised the Administrator of the BPA in March 1973 that unless a plan were developed in the Pacific Northwest to meet the region's projected loads, a "notice of insufficiency" would have to be issued by the BPA to its preference customers informing them that by the early 1980's their power needs might not be completely met by the BPA. That year, the BPA alerted its customers that a notice of insufficiency would have to be issued if an adequate plan were not formulated to meet power needs. In June of 1976, that notice was finally issued to all the BPA preference customers, including the five cities. The BPA's letter to the Cities stated, in part:

> "Bonneville has completed an analysis of the resources it estimates will be available for disposition and its requirements and commitments to supply firm energy in the year July 1, 1983, to June 30, 1984. As a result of this analysis, Bonneville has determined that the firm energy resources available to it will be insufficient in that year to supply in full the City's firm energy requirements, the firm energy requirements of other preference customers, and Bonneville's obligations to deliver firm energy to its other customers.
>
> Therefore, in accordance with the provisions of the Power Sales Contract, I hereby give notice, effective at 2400 hours on June 30, 1976, that in the year beginning July 1, 1983, and in each year thereafter during the term of the Power Sales Contract, Bonneville's obligation to supply firm energy to the City will be limited to an allocation, the amount of which will be computed according to the terms of Section 22 of the General Contract Provisions."

(d) By Idaho's legislature, which in 1975 passed mandatory allocation legislation relating to electrical energy and natural gas. 1975 Idaho Session Laws, Chapter 238.

THE SUPPLY SYSTEM PROJECTS

24. In January 1971, January 1973 and September 1973, the Cities, together with other Pacific Northwest utilities, entered into agreements with the Supply System whereby the utilities purchased and the Supply System sold participant shares of "project capability" from Projects 1, 2 and 3, which the Supply System contracted to use its best efforts to finance and construct. A sample of the agreements that were executed with respect to those three projects is attached as Exhibit 6 to the Supply System's Brief in Opposition to Petition for Writ of Prohibition (dated February 14, 1983).

25. A financing method known as "net billing" was devised to provide financial backing by the BPA for the construction program recommnded in the Hydro-Thermal Power Program. Under net billing, the Supply System, a Washington public entity which is authorized to issue municipal bonds, would construct the power plants. The Supply System would sell, at cost, shares of the power plants generating capability to BPA's customers, such as the Cities, who would assign to BPA the capability they purchased from the Supply System. BPA would "net bill" the participants by crediting their accounts (i.e., the accounts they developed by purchasing power from BPA) with the amount they paid to acquire the new plants generating capability. Under this method, then, the capability of a power project was purchased by BPA from each of the project participants which have in turn purchasd such capability in shares from the Supply System. Each project participant continues to pay the Supply System its share of the costs of the project, and BPA gives each participant a credit in the amount of such payment on the BPA bill to the participant for the power sold to such participant. The United States District Court for the District of Oregon in Case 82-1387-RE adjudicated the net billing agreement and concluded the participants

had authority to execute the agreement because the participants did not bear the "dry hole" risk.

26. With respect to projects 1, 2 and 3 each city entered into its agreement after passage by its city council of a resolution authorizing execution of the agreement. No elections were held with respect to any of the projects. Each of the utilities involved in Projects 1, 2 and 3, including the Cities, provided an opinion letter from its own counsel in a form provided by the Supply Sysrem that stated it had authority to enter into each of its agreements with respect to those projects, prior to doing so.

27. In 1973 a Treasury Department ruling denied tax exempt status for bonds to finance additional thermal plants from which BPA would receive more than 25% of the energy.

28. Starting in December, 1973, the PPC considered the possibility of utilizing the Supply System to finance, design and construct two additional plants. For the next two and one-half years, the PPC and various utilities, the BPA, and the Supply System discussed agreements whereby the utilities would contract for the participants' shares of "project capability" of Projects 4 and 5.

29. In 1975, BPA delayed the issuance of the Notice of Insufficiency for one year, during which time 93 of the 110 preference customers signed an Option Agreement to participate in Projects 4 and 5.

30. In deciding to participate in Projects 4 and 5, the utiities considered the region's forecasts of energy shortages and the Projects' low cost as projected by the Supply System in comparison to alternatives. The Supply System was organized under an enabling law which some financing experts believed offered the best regional vehicle for financing the projects at the lowest cost and marketing the power from them. Projects 4 and 5 were to be twins of Projects 1 and 3 and to be located at the same sites, to take advantage of anticipated substantial savings in shared facility costs, engineering, and economies of scale.

31. In July of 1976, when the Participants' Agreements were entered into, each City submitted to the Supply System an opinion letter as described above. True copies of each of these letters are attached hereto as Exhibits A1-A5. This opinion letter was required of all prospective project participants by the Supply System as a condition to the execution of the Participants' Agreement. The Cities had submitted similar opinion letters in July of 1975, relating to the Option and Services Agreement with the Supply System to obtain an option to purchase shares of project capability in what would become Projects 4 and 5.

32. At a regular open city council meeting, each of the Cities unanimously decided to enter into the Participants' Agreement and passed a resolution authorizing its mayor to execute its Participants' Agreement. Attached as Exhibit B is a sample resolution.

33. Effective July 14, 1976, the Participants' Agreements were executed by 88 public utilities in six states in the Northwest, including the five Cities. A sample Participants' Agreement is attached to the petition of Petitioners Asson, et al. The Participants' Agreements for each city are substantially identical, varying only with reference to the particular participant's name and share of project capability.

34. The Cities signed Participants' Agreements in good faith to meet the power shortages projected by the BPA and others in the Pacific Northwest.

35. The participants in the Supply System Projects 4 and 5 include 24 public utility districts, 21 municipal corporations and 43 electrical cooperatives. The Supply System owns 100% of Project 4 and 90% of Project 5. Ten percent of Project 5 is owned by Pacific Power and Light, a private utility in the State of Washington. Private owners are also involved in Projects 1, 2 and 3. With regard to Project 4 and all the other co-owned projects, owners' liability for the projects' costs are not joint and several: the liability of each owner is limited to its proportionate costs, and the investment of each owner is limited to an amount proportionate to its ownership share.

36. A table showing the "participants' shares" of "project capability" of Projects 4 and 5 is attached as Exhibit E to the Asson petition and Exhibit D to the Bohle petition.

37. The city of Heyburn concluded prior to executing its Agreements that:

(a) It considered itself lawfully empowered by the State of Idaho to purchase electrical power and to provide for its distribution and to sell excess energy.

(b) The city had for many years oeprated its own electric power transmission and distribution systems and during such years had paid as a normal, ordinary and necessary expense of the city the costs and expenses incurred in the acquisition and distribution of the power.

(c) The payment of such costs and expenses had been necessary in order for the city to acquire and distribute the power in order to continue in its function as a public utility.

(d) The electrical energy shortage then existing in the Northwest and projected into the future (at that time) required that the city, in the reasonable exercise of its continued governmental functions, make necessary arrangements to secure to the city a guaranteed supply of electrical power at the most economical rate available.

(e) The options then available to the city through the authorization and execution of the option and services agreement would not exist at a future date.

(f) The acquisition and distribution of electrical power by the city is an ordinary and necessary expense of the city.

(g) That WPPSS is a municipal corporation of the State of Washington and not a private individual, association or corporation.

(h) That by entering into the contracts with WPPSS, the city would thus not be lending its credit in violation of the Idaho Constitution or any cases interpreting the same issued at that time by the Idaho Supreme Court.

38. The Supply System and Chemical Bank have taken the position, which has been held to be correct by a summary judgment order of Judg Coleman of King County, Washington Superior Court, that the Participants' Agreements, Section 6(d), and the Bond Resolution require each participant unconditionally to pay to the Supply System its share of the total annual costs of Projects 4 and 5 including debt service on the bonds issued by the Supply System whether the Projects are operable or operating and notwithstanding the termination of Projects prior to completion. The Cities, for the purpose of these consolidated cases only, accept the position of the Supply System and Chemical Bank as the standard against which this Court should determine whether the Cities had authority to execute the Participants' Agreement.

39. At the time that each city entered into its Participants' Agreement and passed its resolution authorizing execution, its representatives had examined a draft of the Bond Resolution under which 15 separate series of bonds were eventually sold during the period 1977-1981. The Bond Resolution was on file with each city and referred to in each city's authorizing resolution.

40. After execution of the Participants' Agreements, the Supply System issued and sold approximately 2.20 billion dollars in revenue bonds, at varying rates of interest, to finance Nuclear Projects 4 and 5. The date and amounts of the issues are as follows:

Title	Date of Issuance	Dollar Amount
1977A	3-1-77	145,000,000
1977B	6-1-77	90,000,000
1977C	9-1-77	130,000,000
1978A	2-1-78	150,000,000
1978B	6-1-78	150,000,000
1978C	10-1-78	170,000,000
1979A	2-1-79	175,000,000
1979B	9-1-79	150,000,000
1979C	12-1-79	200,000,000
1980A	5-1-80	130,000,000
1980B	7-1-80	180,000,000
1980C	10-1-80	180,000,000
1980D	12-1-80	150,000,000
1981A	3-1-81	170,000,000
1981B	3-1-81	30,000,000

41. Each City's share of the principal amount of the bonds sold, excluding interest and termination costs, is approximately:

Burley	$ 4,180,000
Heyburn	$ 5,654,000
Idaho Falls	$20,130,000
Rupert	$ 7,128,000
Bonners Ferry	$ 4,180,000

None of the Cities conducted an election by the qualified electors to approve execution of the Participants' Agreements, nor did the Cities make provisions for an annual tax to pay the interest or create a sinking fund for payment of the principal amount of the obligation represented by its participants' Agreements.

The respective liability of the Cities under the Participants' Agreements as interpreted for the purpose of this case (paragraph 38 of this Stipulation) exceeded the annual budget of each city adopted under Idaho Code § 50-1002 for 1976.

42. Prior to each bond issuance, the Official Statement for the series of bonds was submitted to the Participants' Committee, a Committee formed under Section 15 of the Participants' Agreement and on which all 88 participants had representation. The first Participants' Committee was elected in August, 1976.

43. The Participants' Committee approved each of the 15 bond issuances. None of the Cities voiced any dissent, during the period 1977-1981, to the borrowing of money for the construction of Projects 4 and 5, although at any time if any of the participants believed that construction budgets were excessive, or that a bond sale was not appropriate, or that a contract award was not appropriate, such proposal of the Supply System could be disapproved by Committee members representing twenty percent or more of the Participants' shares. The Idaho Cities had a combined total Participant's share of less than 2% (.01913).

44. Each of the official statements contain provisions and representations similar to those contained in Exhibit C attached hereto.

45. At the time that they executed their Participants' Agreements for Projects 4 and 5, the Cities desired and requested greater shares of project capability than they were given, as shown in the chart below:

City	Share Requested	Share Given
Burley	.00204	.00190
Heyburn	.00276	.00257
Rupert	.00348	.00324
Bonners Ferry	.00204	.00190
Idaho Falls	.01114	.00915

46. As late as July 23, 1981 the Participants' Committee for Projects 4 and 5, in which the Cities are represented, unanimously passed a resolution of support for Projects 4 and 5. Attached is the resolution, as Exhibit D.

47. On or about January 22, 1982, the Board of Directors and Executive Board of the Supply System adopted resolutions of termination with regard to Projects 4 and 5. At that time Project 4 was approximately 20% complete and Project 5 was approximately 16% complete. Copies of the Notice of Termination and Resolution are attached as Exhibit F to the Asson Petition and Exhibit E to the Bohle Petition.

48. The rates established for electrical service by the Cities are not subject to regulation by the Idaho Public Utilities Commission.

49. Burley raised its electrical rates on November 1, 1982 by Ordinance to create a contingency fund to meet the demands of the Supply System under the Participants' Agreement if the City is adjudicated liable therefor under the Participants' Agreement. A portion of its billings are used to fund the contingency fund.

50. Heyburn raised its electrical rates in November, 1981 and October, 1982 by Ordinance to create a contingency fund to meet the demands of the Supply System under the Participants' Ageement if the City is adjudicated liable therefor under the Participants' Agreement. A portion of its billings are used to fund the contingency fund.

51. Rupert raised its electrical rates on January 1, 1982 and on October 1, 1982 by Ordinance to create a contingency fund to meet the demands of the Supply System under the Participants' Agreement if the city is adjudicated liable therefor under the Participants' Agreement. A portion of its billings are used to fund the contingency fund.

52. The current electrical rates of the Cities with and without charges for Projects 4 and 5 are approximately as set forth

below. This table does not contain the demand charges for commercial and industrial use, which may or may not greatly affect the actual rates of the commercial and industrial users.

Residential Cost Per Kilowatt Hour

	Without 4/5 Charge		With 4/5 Charge	
Heyburn	1st 1500 hrs: Over 1500 hrs:	$.02849 .02294	1st 1500 kwh: Over 1500 kwh:	$.0385 .031
Burley	All kwh:	$.0335	All kwh:	$.0385
Bonners Ferry	All kwh:	$.0290	[none—has not raised rates]	
Idaho Falls	[information not available at time of Stipulation]		[none—has not raised rates]	
Rupert (without multiple residences)	1st 50 kwh Next 450 kwh Next 4500 kwh All above	$.1400 .031 .0215 .0285	$.1800 .04 .028 .0370	

Commercial Cost Per Killowatt Hour

	Without 4/5 Charge		With 4/5 Charge	
Heyburn	1st 15,000 kwh: Over 15,000 kwh:	.02701 .0222	1st 15,000 kwh: Over 15,000 kwh:	$.0365 .03
Burley	1st 15,000 kwh Next 50,000 kwh Next 65,000 kwh	.0335 .0250 .0210	.0385 .0290 .0240	
Bonners Ferry	1st 15,000 kwh Next 50,000 kwh All above	.0290 .0265 .0240	[none—has not raised rates]	
Idaho Falls	[information not available at time of Stipulation]		[none—has not raised rates]	
Rupert	1st 100 kwh/per kw Next 10,000 kwh Next 200 kwh/per kw All above	.0360 .0270 .0185 .0125	.0470 .0350 .0240 .0160	

Industrial Cost Per Kilowatt Hour

	Without 4/5 Charge	With 4/5 Charge
Heyburn	.0222	.03
Burley	Rates included in commercial rates.	
Bonners Ferry	Rates included in commercial rates.	
Rupert	Rates included in commercial rates.	
Idaho Falls	[information not available at time of Stipulation]	[none—has not raised rates]

The figures given in the above chart have been provided by the Cities and are accepted for purposes of this litigation by the Supply System and Chemical Bank, subject to further verification.

53. Including Project 4 and 5 rate charges, the residential rates of all of the Cities are also less than the residential rates of Idaho Power Company and Utah Power and Light. For residential users, Idaho Power charges $.03983 per kilowatt hour; Utah Power charges $.080754 per kilowatt hour in the summer, $.061718 per kilowatt hour in the winter. The Cities and Petitioners accept these figures from the Supply System and Chemical Bank, subject to further verification.

54. The Supply System has, based upon its Fiscal Year 1983 Annual Budget, billed the Cities for payments claimed by the Supply System pursuant to the Participants' Agreement. it is anticipated that the Supply System will bill for additional payments when the successive Annual Budgets are determined.

55. Without the construction of Projects 1 through 5, the Cities have had sufficient electrical power to meet the needs of their customers.

Captions are included for purposes of organization only and are not indepently stipulated facts.

RESPECTFULLY SUBMITTED this 2nd day of June, 1983.

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APPENDIX B

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APPENDIX C

Article 8, Section 3 of the Idaho Constitution provides:

"Limitations on county and municipal indebtedness.—No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two thirds (2/3) of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provisions shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within thirty (30) years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state and provided further that any city may own, purchase, construct, extend, or equip, within and without the corporate limits of such city, off street parking facilities, public recreation facilities, and air navigation facilities, and for the purpose of paying the cost thereof may, without regard to any limitation herein imposed, with the assent of two thirds (2/3) of the qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by, such facilities as may be prescribed by law, and provided further, that any city or other political subdivision of the state may own, purchase, construct, extend, or equip, within and without the corporate limits of such city or political subdivision, water systems, sewage collection systems, water treatment plants, sewage treatment plants, and may rehabilitate existing electrical generating facilities, and for the purpose of paying the cost thereof, may, without regard to any limitation therein imposed, with the assent of a majority of the qualified electros voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue

derived from rates and charges for the use of, and the service rendered by such systems, plants and facilities, as may be prescribed by law; and provided further that any port district, for the purpose of carrying into effect all of any of the powers now or hereafter granted to port districts by the laws of this state, may contract indebedness and issue revenue bonds evidencing such indebtedness, without the necessity of the voters of the port district authorizing the same, such revenue bonds to be payable solely from all or such part of the revenues of the port district derived from any source whatsoever excepting only those revenues derived from ad valorem taxes, as the port commission thereof may determine, and such revenue bonds not to be in any manner or to any extent a general obligation of the port district issuing the same, nor a charge upon the ad valorem tax revenue of such port district."

APPENDIX D

Affiliates and Subsidiaries
(Except Wholly-owned Subsidiaries)
of J. R. Simplot Company

Simplot Cattle Co.
Simplot Livestock Co.
Salmon Meadows, Inc.

No. 83-1619

IN THE
Supreme Court of the United States
October Term 1983

CHEMICAL BANK and
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioners,

v.

GARY ASSON, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF IDAHO

REPLY BRIEF OF PETITIONERS

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June 12, 1984

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No. 83-1619

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ON PETITION FOR WRIT OF CERTIORARI
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REPLY BRIEF OF PETITIONERS

The briefs in opposition[1] demonstrate why this petition, involving the five Idaho municipal participants, should be deferred pending the decision of the Washington Supreme Court in the main litigation involving all the participants in the $2.25 billion bond default of the Washington Public Power Supply System. Petitioners, of course, seek such deferral by motion filed with this petition on April 2, 1984.

[1] There are two briefs in opposition to the petition. The first was filed by respondent City of Heyburn, Idaho ("Heyburn Br."). The second was filed on behalf of all other respondents, including ratepayers and the four other Idaho cities involved ("Asson Br.").

1. *This Case Is Not Insignificant or Unrelated to the Main Washington Litigation.* Respondents disingenuously try to characterize the present case as small, uneventful state law litigation unrelated to the main Washington proceeding involving the default. It is true this case involves only five of the 88 participants. It involves less than two percent of the participants' obligations to the bondholders, as the respondents stress repeatedly. Also, the decision below purports to deal with the case entirely as a question of authority under Idaho law.

But none of this diminishes the significance of this case. Although the amount involved here may be a small portion of the vast sum at issue in Washington, it represents, nevertheless, approximately $43,000,000 in principal obligations of the Idaho cities to repay the bondholders' savings. The appropriation of those savings of private persons throughout the country by local authorities for public use raises important questions, particularly when the responsible parties have successfully sought to be relieved of all accountability by a local court applying local law without regard for Federal constitutional constraints.

Nor can respondents isolate this case from its context or dispute its relationship to the default and the main Washington proceeding which began before this case was instituted. The five Idaho municipal respondents contributed no less than any of the other participants to the course of conduct precipitating the default. The main Washington proceeding, in which the Idaho municipal respondents continue vigorously to litigate, alongside their fellow participants, will address all aspects of that extensive and concerted course of conduct. The main Washington proceeding contains Federal constitutional issues identical to those raised here. The Washington Supreme Court must address arguments that the Idaho municipal respondents have raised there in an effort to escape the very obligations at issue here.

The present petition is thus part of a much larger picture that this Court should have in view when considering the serious Federal issues raised by this case. Indeed, based on the

results to date in the Washington litigation, the respondent City of Heyburn "firmly maintains that the Idaho Supreme Court opinion . . . holding the Idaho cities without constitutional authority to enter into the contracts was superfluous and moot". (Heyburn Br. at 4.) Whether this Court should act on that suggestion of mootness by vacating the judgment or remanding for further consideration is yet another issue that is most appropriately addressed in conjunction with an assessment by this Court of the Washington Supreme Court's decision, once it has issued.

2. *The Present Case Raises Serious Federal Constitutional Issues.* Respondents contend that this case does not involve "known, traditional property rights". (Asson Br. at 16.) To the contrary, this case involves the appropriation—for respondents' benefit—of the savings of many innocent private individuals. Few property rights are better "known" or more "traditional" than those preventing the confiscation of private funds for public purposes.

Respondents further contend that there has been no "prior positive action" affording the bondholders a "reasonable expectancy" that their property would be protected. (Asson Br. at 16.) This assertion inexplicably ignores municipal respondents' express, written assurances, backed by opinions of their counsel, of their authority to guarantee repayment of the bond purchasers' funds. Those written assurances were repeatedly extended for more than four years while 14 separate issues of bonds were sold. Municipal respondents provided those assurances precisely in order to create the expectations that would in turn induce private financing of respondents' public venture. But for those assurances, that public venture could not have been undertaken.

Respondents also claim that there has been no "municipal action depriving any party of property". (Asson Br. at 17.) In fact, reacting to the failure of the project on which they expended private funds, municipal respondents sought to abrogate any obligation to return all or any portion of the bond-

holders' stake. It would be difficult to conceive of a more effective appropriation of private property.

Finally, respondents contend that the present case "turns completely on an interpretation of local, Idaho constitutional law". (Asson Br. at 19.) This assertion mistakenly supposes that the Federal Constitution imposes no constraints on the manner in which state law may be applied to impair established rights. When government purposefully creates expectations to induce investment for its own benefit, it may not then both destroy those expectations and appropriate the investment for itself. *E.g., Kaiser Aetna v. United States*, 444 U.S. 164, 175, 179 (1979). By applying state law to authorize such improper conduct, the court below achieved a result that the Federal Constitution precludes.

That result is rendered especially egregious by the violent alteration of local law through which it was accomplished. The decision below was not dictated by a "70-year-old line of authority" as most of the respondents contend.[2] (Asson Br. at 12.) As the respondent City of Heyburn expressly concedes, the Idaho Supreme Court "seems to have ruled contrary to the previously announced tests for constitutionality of such agreements set forth in [citation] without overruling it or adequately distinguishing it". (Heyburn Br. at 2.) Similarly, the opinion of

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[2] The "70-year-old line of authority" that respondents discuss does not even address, much less support, the ruling that effected the startling change in law at issue here. That crucial ruling severely contracted the scope of the "ordinary and necessary" expense provision of Article 8, Section 3 of the Idaho Constitution. By contrast, respondents' discussion of Idaho precedent focuses on Idaho's treatment of the "special fund" doctrine. (Asson Br. at 10-12.) That doctrine has no bearing whatsoever on the "ordinary and necessary" expense provision that the court below narrowed in a surprising, *ad hoc* fashion. Nor does it in any way address the failure of the court below to apply alternative, equitable state law remedies, such as restitution, advanced by petitioners.

the dissenting justice of the Idaho Supreme Court described the opinion of the majority as follows (Appendix A at A-21):

> "It is only because, through hindsight, the majority can see what a 'bad deal' the cities have made that they now attempt to extricate these cities from their precarious position through a unique interpretation of our constitution as applied to the facts of this case."

Indeed, if the "70-year-old line of authority" was so clear, why did the municipal respondents *themselves* issue express and comprehensive written assurances stating that they possessed authority to secure the bond purchasers' funds? Respondents do not explain how they could have issued and adhered to these assurances for more than four years if, as they now claim, a "70-year-old line of authority" made clear their lack of power to join the participants' common venture. For the reasons stated, and under the authorities cited in the petition at 11-13, local law cannot be fundamentally redefined so as to have preclusive effect upon preexisting Federal constitutional rights. Again, these serious constitutional issues are best considered in the context of the forthcoming decision of the Washington Supreme Court in the main litigation.

3. *Deferral Will Not Prejudice Respondents.* Respondents do not, and cannot, claim that deferral of the petition will prejudice them in any way. As they acknowledge, the Idaho municipal respondents are parties in the main Washington case, where they hope to get relief in addition to that already given them by the Idaho Supreme Court. On the other hand, the denial of the petition at this stage, before the final decision in the main Washington case, would prejudice petitioners by precluding a review of the holding below. Since consideration as to whether such review is appropriate can best be made when the main Washington decision is available, the matter should be left open pending that decision.

Conclusion

The foregoing considerations—the close relationship between the two cases (including the identity of the substantial Federal constitutional questions raised by petitioners in each case), the suggestion of the City of Heyburn of mootness arising from the lower court decision in the main Washington case, and respondents' failure even to contend that they would suffer prejudice if review of this petition should be deferred—suggest the appropriateness of deferring consideration of this petition pending the forthcoming decision in the Washington Supreme Court case involving all participants to the nuclear power projects and the resulting $2.25 billion default. Accordingly, and for the reasons stated in the petition and motion to defer, the consideration of this petition should be deferred until the forthcoming Washington Supreme Court case is available and this Court can consider any petition for a writ of certiorari to review it.

June 12, 1984.

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